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No. 92-1956-CFX
Status: GRANTED

Docketed:
June 9, 1993

Title: Consolidated Rail Corporation, Petitioner
v.
James E. Gottshall
and
Consolidated Rail Corporation, Petitioner
v.
Alan Carlisle

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Wellington,Ralph G.

Counsel for respondent: Obrien Jr.,John J., Farrell,J. Michael, Myers Jr.,William L.

92-1263, Conrail v. Alan Carlisle, 3-29-93.

Entry	Date	Note	Proceedings and Orders
1	Jun 9 1993	G	Petition for writ of certiorari filed.
2	Jun 9 1993		Appendix of petitioner filed.
3	Jun 29 1993		Brief of respondent James E. Gottshall in opposition filed.
4	Jul 7 1993		DISTRIBUTED. September 27, 1993
5	Jul 8 1993	X	Brief amici curiae of New Jersey Transit Rail Operations, Inc., et al. filed.
6	Jul 9 1993	X	Brief of respondent Alan Carlisle in opposition filed.
7	Aug 3 1993	X	Reply brief of petitioner filed.
8	Sep 22 1993	X	Supplemental brief of petitioner filed.
10	Oct 4 1993		REDISTRIBUTED. October 8, 1993
11	Oct 12 1993		Petition GRANTED.
			**
12	Nov 9 1993		Record filed.
		*	Partial proceedings U. S. Court of Appeals, Third Circuit (Gottshall and Carlisle) (BOX).
15	Nov 23 1993	G	Motion of Association of American Railroads for leave to file a brief as amicus curiae filed.
22	Nov 23 1993	G	Motion of Southeastern Pennsylvania Transportation Authority for leave to file a brief as amicus curiae filed.
13	Nov 24 1993	G	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
14	Nov 24 1993	G	Motion of Product Liability Advisory Council, Inc. for leave to file a brief as amicus curiae filed.
21	Nov 24 1993		Brief amicus curiae of New Jersey filed.
16	Nov 26 1993		Joint appendix filed.
17	Nov 26 1993		Brief of petitioner Consolidated Rail Corporation filed.
23	Nov 26 1993		Record filed.
		*	Original proceedings U.S. District Court, Eastern District of Pennsylvania (GOTTSHALL) (Box)
18	Dec 6 1993		Motion of Association of American Railroads for leave to file a brief as amicus curiae GRANTED.
19	Dec 6 1993		Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
20	Dec 6 1993		Motion of Product Liability Advisory Council, Inc. for

2 pp

Entry	Date	Note	Proceedings and Orders
			leave to file a brief as amicus curiae GRANTED.
24	Dec 6 1993		Record filed.
		*	Original proceedings U.S. District Court, Eastern District of Pennsylvania (CARLISLE) (BOX)
25	Dec 22 1993		Brief of respondent James E. Gottshall filed.
26	Dec 27 1993		Brief of respondent Alan Carlisle filed.
27	Dec 29 1993		SET FOR ARGUMENT MONDAY, FEBRUARY 28, 1994.(1ST CASE).
28	Jan 7 1994		CIRCULATED.
29	Jan 26 1994	X	Reply brief of petitioner Consolidated Rail Corporation filed.
30	Jan 31 1994	G	Motion of respondent James E. Gottshall for divided argument filed.
31	Feb 1 1994	G	Motion of respondent Alan Carlisle for divided argument filed.
32	Feb 22 1994		Motion of respondent James E. Gottshall for divided argument GRANTED.
33	Feb 22 1994		Motion of respondent Alan Carlisle for divided argument GRANTED.
34	Feb 28 1994		Motion of Southeastern Pennsylvania Transportation Authority for leave to file a brief as amicus curiae GRANTED.
35	Feb 28 1994		ARGUED.

No. 92-1956

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In The

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that the broad remedial purposes of the Federal Employers' Liability Act justify allowing a cause of action for the negligent infliction of emotional distress that is not generally recognized under the common law?

2. Did the court of appeals err in holding that there is a cause of action under the Federal Employers' Liability Act for the negligent infliction of emotional distress caused by acts that lack physical impact with or a threat of physical impact to the plaintiff?

3. Did the court of appeals err in holding that there is a cause of action under the Federal Employers' Liability Act for the negligent infliction of emotional distress arising solely from a plaintiff's general working conditions?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

This petition involves two cases decided by the United States Court of Appeals for the Third Circuit that involve closely related questions and for which a single petition for a writ of certiorari is being filed pursuant to Supreme Court Rule 12.2.

In the first case, the named appellant in the court of appeals, and one of the respondents here, is James E. Gottshall. In that case, the named appellee in the court of appeals, and the petitioner here, is Consolidated Rail Corporation. In the second case, the named appellee in the court of appeals, and the other respondent here, is Alan Carlisle. In that case, the named appellant in the court of appeals, and the petitioner here, is Consolidated Rail Corporation.

Petitioner, Consolidated Rail Corporation, is a publicly held corporation that is not owned by any parent corporation. Consolidated Rail Corporation has an ownership interest in the following companies: The Akron & Barberton Belt Railroad Company; Albany Port Railroad Company; Belt Railroad Company of Chicago; Calumet Western Railway Company; Chicago & Western Indiana Railroad Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; Railroad Association Insurance, Limited; Trailer Train Company; and Transportation Data Exchange, Incorporated. Consolidated Rail Corporation does not have an ownership

interest in any other company, except for its wholly-owned subsidiaries.

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No. ________

In The

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October Term, 1992

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

This petition for a writ of certiorari requests review of an important and recurring issue of federal law that has confused, confounded, and sharply divided the lower federal courts: what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA"). Six years ago, in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court suggested that in some circumstances a cause of action for the negligent infliction of emotional distress might be cognizable under the FELA. It directed the lower courts to "glean[] guidance from common-law developments" in ascertaining whether in any particular case such a cause of action would be cognizable. *Buell*, 480 U.S. at 568.

In the two cases for which this writ of certiorari is sought, the Third Circuit Court of Appeals, far from gleaning guidance from the common law, flatly rejected the generally accepted common law tests that delineate the contours of recovery for the negligent infliction of emotional distress. In place of those tests, it adopted an expansive scheme of recovery for the negligent infliction of emotional distress that is virtually unprecedented both under the common law and under the FELA. Notably, the court of appeals in both cases sought this Court's guidance in resolving the issue. Accordingly, these cases present the ideal vehicle for this Court to address the issue left open by *Buell*.

OPINIONS BELOW

In *Gottshall v. Consolidated Rail Corporation*, the opinion of the United States District Court for the Eastern District of Pennsylvania (A-91 to A-105) is reported at 773 F. Supp. 778 (E.D. Pa. 1991). The opinion of the United States Court of Appeals for the Third Circuit (A-1 to A-72) is reported at 988 F.2d 355 (3d Cir. 1993). The order of the court of appeals denying the petition for rehearing and suggestion of rehearing in banc (A-146 to A-147) also is reported at 988 F.2d 355 (3d Cir. 1993).

In *Carlisle v. Consolidated Rail Corporation*, the opinion of the United States District Court for the Eastern District of Pennsylvania denying Consolidated Rail Corporation's motion for summary judgment (A-106 to A-114) has not been officially reported. The district court opinion denying Consolidated Rail Corporation's motion for judgment notwithstanding the verdict or for a new trial (A-115 to A-145) is reported at 790 F. Supp. 521 (E.D. Pa. 1992). The opinion of the United States Court of Appeals for the Third Circuit (A-73 to A-90) will be reported at 990 F.2d 90 (3d Cir. 1993).

STATEMENT OF JURISDICTION

The judgment of the court of appeals in *Gottshall v. Consolidated Rail Corporation* was entered on February 8, 1993. The order denying the petition for rehearing and suggestion of rehearing in banc was entered on March 11, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The judgment of the court of appeals in *Carlisle v. Consolidated Rail Corporation* was entered on March 29, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. § 51, provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he

> is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASES

A. *Gottshall v. Consolidated Rail Corporation*

On a hot day in August 1988, a Consolidated Rail Corporation ("Conrail") work gang was replacing a defective rail track in a remote area.[1] After several hours,

one worker, Richard Johns, had a heart attack and collapsed. The supervisor was unable to radio for help because Conrail had taken the communications base station off the air for repairs (without informing the work gang). While the supervisor drove for help, another worker, James Gottshall, one of Johns' friends, tried without success to resuscitate Johns. Johns died before the paramedics came for help. At the paramedics' instruction, Johns' body was covered and remained on the scene until the coroner arrived. The workers were ordered back to work.

Gottshall was extremely upset by the incident. For several days he returned to work, but then, fearing that he, too, would have a heart attack, he told his supervisor that he could no longer endure the hot weather conditions and the exhaustion, went home, secluded himself in his basement, and subsequently spent three weeks as an in-patient in a psychiatric institution. Gottshall experienced physical symptoms of emotional distress, including a sick feeling, loss of appetite, weight loss, cold sweats, nausea, nightmares, and insomnia. He was diagnosed as suffering from major depression and post-traumatic stress disorder.

Gottshall brought an action under the FELA against Conrail in the United States District Court for the Eastern District of Pennsylvania for the negligent infliction of emotional distress. Gottshall alleged that various management decisions made by Conrail were negligent, including pushing him and the other members of the work gang to work in the midst of a heat wave, failing to provide adequate scheduled work breaks, discouraging unscheduled work breaks, canceling a course on cardiopulmonary resuscitation, and scheduling work in a remote job location. Federal jurisdiction was based on 28 U.S.C. § 1331.

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[1] The court of appeals in *Gottshall* was reviewing the district court's grant of summary judgment for Conrail. Accordingly, for purposes of this petition only, Conrail will assume the facts in the light most favorable to the plaintiff. *See Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962) ("[w]e look at the record on summary judgment in the light most favorable to . . . the party opposing the motion").

The district court granted Conrail's motion for summary judgment (A-91 to A-105). It held that Gottshall's complaint did not give rise to a cause of action for negligent infliction of emotional distress under any accepted common law theory (A-97 to A-100), and, furthermore, that it did not satisfy the general common law tort requirements of foreseeability, cause in fact, and proximate cause (A-100 to A-105).

The court of appeals reversed (A-1 to A-72). The court held that as long as there is some "indicia of genuineness" to the injury and the claim satisfies general tort requirements of breach of duty, injury, and causation, an FELA plaintiff can recover for negligent infliction of emotional distress even if the claim does not fall within the common law physical impact, zone of danger, or bystander tests – in short, even if the claim would not be cognizable under the common law (A-64). The dissenting judge would have held that under the facts of the case, Conrail did not breach a duty to Gottshall and that Conrail could not have foreseen Gottshall's injury (A-66).

In rejecting the common law tests for the recovery of damages for the negligent infliction of emotional distress under the FELA, the Court of Appeals for the Third Circuit adopted an approach that is broader than any

previously adopted by the courts of appeals. The breadth of the court of appeals' holding is best illustrated by its very first application – *Carlisle v. Consolidated Rail Corporation.*

B. *Carlisle v. Consolidated Rail Corporation*

Alan Carlisle was a Conrail train dispatcher and then supervisor of rail operations from 1976 until 1988. In 1984, Conrail reduced its work force, which in turn had the effect of increasing the amount of work for which Carlisle was responsible. In addition, some of the equipment with which Carlisle worked was outdated and poorly-functioning. In 1988, Carlisle became a trainmaster, although he still worked at times as a supervisor and dispatcher and retained many of his former job responsibilities. Carlisle experienced stress from the demands of his job and eventually had a nervous breakdown.

Carlisle brought an action under the FELA against Conrail in the United States District Court for the Eastern District of Pennsylvania for the negligent infliction of emotional distress. Like Gottshall, Carlisle claimed that Conrail's management decisions were negligent and caused him emotional injury. Specifically, Carlisle alleged that Conrail breached its duty to provide a safe workplace by requiring him to work under unreasonably stressful and dangerous conditions, which resulted in emotional injury. Federal jurisdiction was based on 28 U.S.C. § 1331.

The district court denied Conrail's motion for summary judgment (A-106 to A-114). The jury returned a verdict for Carlisle in the amount of $386,500, and the district court denied Conrail's motions for judgment notwithstanding the verdict or for a new trial (A-115 to A-145).

The court of appeals affirmed (A-73 to A-90). Characterizing its decision in *Gottshall* as "for the first time [upholding] recovery under the FELA for negligent infliction of emotional distress without proof of any physical impact, under circumstances where the emotional distress was accompanied by physical manifestations" (A-84), the court in *Carlisle* construed the issue before it as whether "protracted exposure to work-related, stressfully injurious conditions [can] lead to liability under the FELA" (A-87). On the basis of the general foreseeability test it had adopted in *Gottshall*, the court of appeals held that it could (*id.*).

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for a writ of certiorari because: (1) the issue of what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the FELA is important and recurring and has created profound conflicts among the circuits; and (2) the decisions of the Third Circuit Court of Appeals in *Gottshall* and *Carlisle* conflict with the applicable precedents of this Court.

In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court spoke for the first time on the issue of whether a cause of action for emotional injury may be cognizable under the FELA. In *Buell*, a carman filed an FELA action, alleging that he suffered emotional injury as a result of an unsafe workplace caused by certain

incidents of harassment. Although this Court found the record insufficiently developed on the emotional injury issue, and therefore remanded to the court of appeals, it discussed certain general principles with regard to possible recovery for claims of emotional injury under the FELA. In its discussion, the Court explained that "FELA jurisprudence gleans guidance from common-law developments." *Id.* at 568.

This Court's opinion in *Buell* has spawned an abundance of litigation, but a dearth of consensus. In their struggle to determine the parameters for recovery for emotional injury under the FELA, the lower federal courts have applied widely-varying approaches. None, however, has gone as far as the court of appeals did in these cases by allowing a cause of action for negligent infliction of emotional distress under the FELA that is not generally recognized under the common law.

Notably, in both *Gottshall* and *Carlisle*, the court of appeals recognized that there is a growing need for resolution of the inter-circuit conflicts and expressly sought guidance from this Court. In *Gottshall*, the court stated that "[i]t is clear that there are open conflicts among the circuits. A review of the decisions in other circuits in the wake of *Buell* indicates that there is no common discernable, principle, test, view or attitude" (A-20 to A-21) (footnote omitted). In *Carlisle*, the court stated that "because the district courts of this circuit have rendered conflicting opinions on this topic, we see a heightened need for clear direction from this circuit and, ultimately, the Supreme Court" (A-84).

The approach adopted by the court of appeals in *Gottshall* and applied in *Carlisle* in effect transforms the FELA into a full recovery, general foreseeability statute in contravention both of the fault standard of the FELA and the holdings of this Court. Thus, in *Gottshall*, the court of appeals – although ostensibly applying traditional tort principles of duty, injury, and causation (A-44) – concluded that: (1) the predominant policy of the FELA is to assure a liberal recovery for all injured employees (A-25 to A-31); (2) the sole purpose of the common law tests – actually developed to establish reasonable limits on liability for the negligent infliction of emotional distress – is to identify genuine injuries (A-31); (3) the common law negligent infliction of emotional distress tests are to be discarded when they bar recovery under the FELA for genuine injuries (A-30); and (4) therefore, there exists a cause of action for negligent infliction of emotional distress under the FELA that is not generally recognized under the common law (*id.*).

In essence, therefore, the court of appeals held that whenever an injury has an "indicia of genuineness" and it is foreseeable, the employee will recover. In so doing, the court equated injury and foreseeability with recovery and disregarded the carefully-drawn, fault-based limitations of the common law on recovery for negligent infliction of emotional distress.

This underlying problem with the court of appeals' opinions is evident in *Gottshall*, where, while acknowledging that "the long-standing fundamental elements of bringing a FELA action are traditional common law elements" (A-29), the court nonetheless concluded that "in many ways FELA is the antithesis of

the common law" (*id.*). Thus, the court reasoned, "doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims" (A-30). Accordingly, in *Gottshall*, after establishing that Gottshall's injuries were genuine (A-35 to A-44), the court of appeals held that "a reasonable employer should have foreseen" (A-49) that in the course of performing his or her job on an exceedingly hot day, a laborer such as Gottshall could suffer emotional distress. Similarly, in *Carlisle*, the court of appeals held that "when it is reasonably foreseeable that extended exposure to dangerous and stressful working conditions will cause injury to a worker, the employer may be held liable under the FELA for the employee's resulting injuries" (A-88).

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUE OF WHAT CIRCUMSTANCES MAY GIVE RISE TO A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER THE FELA IS IMPORTANT AND RECURRING AND HAS CREATED PROFOUND CONFLICTS AMONG THE CIRCUITS.

In the aftermath of *Buell*, "recovery for wholly emotional injury under the . . . FELA has become an 'important and recurring' issue of federal law." *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1282 (1st Cir.), *petition for cert. filed*, 61 U.S.L.W. 3698 (April 1, 1993) (quoting *Ray v. Consolidated Rail Corp.*, 112 S. Ct. 914 (1992) (White, J., dissenting from denial of certiorari)). It is an important issue because it involves the fundamental interpretation of a heavily-litigated federal statute.

Indeed, in the six years since *Buell* was decided, there have been in excess of eighty written opinions by the federal courts, including over twenty opinions by the courts of appeals, wrestling with the issue of what circumstances may give rise to a cause of action for emotional injury under the FELA.

The court of appeals' decisions in *Gottshall* and *Carlisle* undoubtedly will increase the amount of confusion – and litigation. In requiring only that emotional injury have an "indicia of genuineness" and be foreseeable in order for a cause of action for negligent infliction of emotional distress to exist under the FELA, the two cases open the door for innumerable claims on the part of railroad workers: every railroad laborer who works under difficult, stressful conditions arguably may state a claim under the FELA.

Clearly, such an important issue of federal law that affects so many cases across the nation deserves a uniform approach. However, there is no uniformity or consistency with regard to the circumstances that give rise to a cause of action for the negligent infliction of emotional distress under the FELA. Rather, the courts widely vary as to the requirements for such recovery. Indeed, in many cases it is even difficult to ascertain whether the court is resolving an intentional infliction or a negligent infliction of emotional distress claim. Both intra- and inter-circuit conflicts abound. Some courts of appeals have purported to avoid the issue (First and Sixth); some have required either physical impact or the threat of physical impact to the plaintiff (Third, Fifth, and Seventh); some have required "outrageous" or "unconscionable" conduct (Fourth and Sixth); and some have permitted "full recovery" for foreseeable, genuine injuries (Third and Ninth).

In short, as the court in *Gottshall* observed, "[w]hile federal courts uniformly agree that claims for negligent infliction of emotional distress are cognizable under FELA, they are badly splintered as to the elements necessary to bring such a claim" (A-12). *See also Ellenwood*, 984 F.2d at 1282 ("The circuits vary in their treatment of such claims"). The following brief summary of post-*Buell* FELA negligent infliction of emotional distress decisions in the courts of appeals makes clear that the lower courts are in total disarray on this important question of federal law.

The Court of Appeals For the First Circuit

The Court of Appeals for the First Circuit has attempted to avoid deciding the issue of when an FELA plaintiff may recover for negligent infliction of emotional distress. In *Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 694 (1st Cir. 1987), a case in which the plaintiff alleged that the railroad had negligently injured him through long continued harassment, the court "resist[ed] the invitation to make this a pioneer case exploring the frontier possibly opened up by *Buell*" by holding that plaintiff had failed to show causation between the alleged injury and the alleged harassment at work.

Similarly, in *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987), a case in which the plaintiff claimed that his off-the-job heart attack was caused by on-the-job harassment, the court held that the plaintiff had failed to establish that Conrail reasonably could have foreseen that he would suffer a heart attack as a result of job stress.

Finally, in *Ellenwood*, 984 F.2d at 1282,[2] a case involving Exxon's adoption of a new employment policy, the court declined to address the issue of whether the plaintiff could recover for the negligent infliction of emotional distress without showing a physical injury, explaining that because plaintiffs had "failed to present their claims of negligence with particularity [by specifying the negligent acts of commission or omission], this is not an appropriate case in which to undertake such a substantial inquiry."

The Court of Appeals for the Third Circuit

In the Court of Appeals for the Third Circuit, *Gottshall* and *Carlisle* appear to create a rather significant intra-circuit conflict. Prior to *Gottshall* and *Carlisle*, the leading Third Circuit cases concerning recovery for negligent infliction of emotional distress were *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 970 (1991), and *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir. 1991). In *Holliday*, the plaintiff claimed that his fear of being crushed in a switching operation, which he was unqualified to perform, caused him psychological injury. 914 F.2d at 422. Emphasizing that Holliday had not been involved in any accident, the court concluded that his claim was one for

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[2] Although *Ellenwood* was a case brought under the Jones Act rather than the FELA, the Jones Act incorporates the fault standards of the FELA. *See* 46 U.S.C. § 688; *see also Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 547 (1960) (Jones Act extended to seamen the remedies made available to railroad workers under the FELA).

ordinary job-related stress that is not cognizable under the FELA. *Id.* at 425.

In *Outten*, the plaintiff claimed that he suffered emotional distress as a result of his awareness that a collision might take place down the track from where he was working. 928 F.2d at 75. Outten was at least one mile away from the collision when it occurred. *Id.* at 76. In analyzing Outten's claim under traditional common law negligent infliction of emotional distress principles, the court of appeals held that Outten could not recover in view of the absence of physical impact, Outten's admitted presence outside the zone of danger, and his lack of any personal responsibility for the collision. *Id.* at 79.

Thus, the Third Circuit's pre-*Gottshall* and *Carlisle* decisions strongly suggested that recovery for negligent infliction of emotional distress under the FELA is limited to cases in which the plaintiff either suffered a physical impact or faced the threat of a physical impact and does not extend to cases involving general working conditions and ordinary management decisions such as those at issue in *Gottshall* and *Carlisle*. Clearly, the court of appeals' adoption of a general foreseeability test in *Gottshall* and *Carlisle* is inconsistent with its "zone of danger" approach in *Holliday* and *Outten*.

The Court of Appeals for the Fourth Circuit

The Court of Appeals for the Fourth Circuit has held that a plaintiff must show outrageous conduct in order to recover for emotional distress under the FELA. In *Elliott v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1229 (4th Cir. 1990), where the plaintiff sought to recover for emotional distress allegedly resulting from disputes in the workplace with her supervisors, the court affirmed the decision of the district court dismissing plaintiff's claims, concluding that the conduct complained of simply reflected poor office relationships, not unconscionable abuse or outrageous conduct.

The Court of Appeals for the Fifth Circuit

Like the Court of Appeals for the Third Circuit, the Court of Appeals for the Fifth Circuit has taken a variety of approaches in FELA emotional injury cases. In *Gaston v. Flowers Transp.*, 866 F.2d 816, 817 (5th Cir. 1989), the court affirmed the district court's denial of recovery for negligent infliction of emotional distress under the Jones Act where a seaman saw his half-brother crushed to death, on the ground that it would represent an unwarranted and extreme expansion of liability to permit a plaintiff who did not fear for his own safety to recover under the FELA. Like the Third Circuit Court of Appeals in *Holliday* and *Outten*, the court of appeals in *Gaston* suggested that a plaintiff would have to be in the "zone of danger" to recover for negligent infliction of emotional distress. *Id.* at 819-20.

In *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1010 (5th Cir. 1991), *on rehearing*, 966 F.2d 166 (5th Cir.) (*en banc*), *cert. denied*, 113 S. Ct. 604 (1992), the Court of Appeals for the Fifth Circuit went beyond the zone of danger test that it applied in *Gaston* and adopted an expansive, "full recovery" approach similar to *Gottshall* and *Carlisle*. In *Plaisance*, an experienced tugboat captain witnessed an explosion when a barge ruptured a pipeline. *Id.* at 1005. After reviewing the case law and the various common law theories of recovery, the court concluded that an

FELA plaintiff can recover for negligent infliction of emotional distress if a reasonable person, normally constituted, would not have been able to cope adequately with the mental distress arising from the circumstances. *Id.* at 1010. However, the court denied recovery to Plaisance because it was not reasonably foreseeable that an experienced seaman would experience an emotional reaction such as that claimed. *Id.* at 1011.

The court of appeals granted *en banc* reconsideration in *Plaisance*. The full court concluded that because the plaintiff's claim was not cognizable even under the most liberal theory of recovery, the panel should not have reached the issue of whether foreseeability alone could support a recovery for the negligent infliction of emotional distress. *Plaisance v. Texaco, Inc.*, 966 F.2d 166, 168 (5th Cir.) (*en banc*), *cert. denied*, 113 S. Ct. 604 (1992). In addition, the *en banc* court emphasized that *Gaston* remained the law of the circuit. *Id.* at 169.

The Court of Appeals for the Sixth Circuit

Like the courts of appeals in the Third and Fifth Circuits, the Court of Appeals for the Sixth Circuit has taken differing approaches to recovery for negligent infliction of emotional distress under the FELA. In *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 426 (6th Cir. 1988), the court refused to decide whether a claim for negligent infliction of emotional distress without verifiable physical manifestation is actionable, holding that because Conrail had taken legitimate disciplinary action against Stoklosa, it could not reasonably have foreseen that its decision would have an extreme emotional effect on him. In *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539-40

(6th Cir. 1990), the court again refused to decide whether a claim for negligent infliction of emotional distress was cognizable under the FELA, holding instead that the plaintiff had failed to establish a breach of the employer's duty because the employer's conduct was not an "unconscionable abuse" and it was not foreseeable that the plaintiff would suffer emotional injury from his supervisor's management style.

The Court of Appeals for the Seventh Circuit

The Court of Appeals for the Seventh Circuit consistently has held – similarly to the Third Circuit in *Holliday* and *Outten* and the Fifth Circuit in *Gaston* – that there is no cause of action under the FELA for negligent infliction of emotional distress caused by acts that lack physical impact or a threat of physical impact to the plaintiff. *See Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 914 (1992); *Hammond v. Terminal R.R. Ass'n of St. Louis*, 848 F.2d 95, 96 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989); *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987); *see also Gillman v. Burlington Northern R.R. Co.*, 878 F.2d 1020, 1024 (7th Cir. 1989).

The Court of Appeals for the Ninth Circuit

The Court of Appeals for the Ninth Circuit has allowed FELA claims for "wholly mental injury," although it has not identified specific parameters for the recovery of damages in such claims. *See Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309, 1313 (9th Cir. 1986); *see also Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366, 1372 n.2 (9th Cir. 1987).[3]

* * *

In sum, there simply is no consistent approach among the courts of appeals with respect to the recovery of damages under the FELA for negligent infliction of emotional distress. To the contrary, the courts are in utter disarray, both within and among the circuits. This Court should accept the Third Circuit Court of Appeals' invitation and grant certiorari to resolve these conflicts.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE THIRD CIRCUIT COURT OF APPEALS IN *GOTTSHALL* AND *CARLISLE* CONFLICT WITH THE APPLICABLE PRECEDENTS OF THIS COURT.

The court of appeals' adoption in *Gottshall* and *Carlisle* of a general foreseeability test for negligent infliction of emotional distress claims under the FELA stands in sharp conflict with this Court's FELA jurisprudence. The starting point, of course, is *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987). In *Buell*, this Court directed the federal courts to "glean[] guidance from common-law developments" in resolving FELA negligent infliction of emotional distress claims. 480 U.S. at 568; *see also Urie v. Thompson*, 337 U.S. 163, 174 (1949).

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[3] Like the courts of appeals, the federal district courts have taken widely varying approaches to recovery for negligent infliction of emotional distress. As recognized by the court of appeals in *Gottshall*, "[t]he jurisprudence among the district courts is no more consistent" than that of the courts of appeals (A-21 n.5) (citing cases).

Recognizing that, if general foreseeability were the only limiting principle, defendants sued for negligent infliction of emotional distress could face virtually unlimited liability far in excess of that justified by their degree of fault, most common law courts impose one of three tests to place reasonable limits on defendants' potential liability. A small minority of states applies the physical impact test, allowing recovery for emotional injury only if the plaintiff suffered a physical injury that induced the emotional injury. *See* Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitations Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781, 792-93 & n.59 (1988). A larger number of states permits recovery for emotional injury if the plaintiff is in the "zone of danger" of physical impact, that is, if the plaintiff faces a threat of physical impact. *See id.* at 796-99 & n.91. Finally, another group of states grafts an exception onto the zone of danger test that allows a plaintiff to recover damages for negligent infliction of emotional distress caused by witnessing harm to immediate family members, even if the so-called bystander is not personally in the zone of danger. *See id.* at 806-13 & nn.139, 140 & 142.

The various common law tests delineating recovery for negligent infliction of emotional distress – the physical impact test, the zone of danger test, and the bystander test – each reflect policy decisions to curtail the unlimited liability that results from the imposition of a general foreseeability test such as that adopted in *Gottshall* and *Carlisle*. *See Thing v. La Chusa*, 48 Cal. 3d 644, 654, 771 P.2d 814, 819, 257 Cal. Rptr. 865, 870 (1989) ("policy considerations mandate[] that infinite liability be avoided by restrictions that . . . somehow narrow the class of potential plaintiffs"). *See generally* Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 24 (1953) (emphasizing the need for reasonable limits on liability in negligence cases).

In formulating its general foreseeability approach, however, the Court of Appeals for the Third Circuit rejected the carefully-drawn, fault-based limitations of the common law – as well as this Court's instructions in *Buell*. In so doing, the court of appeals created broad liability for a defendant virtually unprecedented at common law. In *Gottshall*, the court held that the plaintiff had stated a cause of action because a jury could conclude that it was foreseeable that he would suffer an emotional injury because he worked under the same general working conditions that caused his friend to suffer a heart attack (A-52 to A-53). Once this rationale is accepted, it is also foreseeable that a worker on a different Conrail crew who labored under similar conditions would suffer emotional injury upon hearing of the death of Gottshall's friend. The logical extension of *Carlisle* is even more striking. Because a railroad dispatcher's job is stressful, the court of appeals concluded that his injuries were foreseeable. Arguably, this conclusion implies that all railroad dispatchers in the country have a cause of action under the *Carlisle* rationale if they can show even the slightest physical manifestation of their stress.

The court of appeals justified its disregard of the common law negligent infliction of emotional distress limits on the basis of FELA policy and on three of this Court's FELA decisions that relaxed plaintiff's burden to prove certain of the elements of common law negligence. In actuality, however, FELA policy, firmly grounded on the fault-based premise of common law negligence, does not justify allowing a cause of action that would compensate all genuine injuries just because a jury could find such injuries to be foreseeable. Moreover, the decisions of this Court on which the court of appeals relied to justify its wholesale departure from the common law do not at all support the court's position.

The operative provision of the FELA provides: "Every common carrier . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the *negligence* of any . . . such carrier. . . . " 45 U.S.C. § 51 (emphasis added). Thus, as this Court repeatedly has recognized, the FELA is not an insurance statute or a no-fault statute equivalent to state workers' compensation statutes. *See, e.g., Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 140 (1959); *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949); *Ellis v. Union Pacific R.R. Co.*, 329 U.S. 649, 653 (1947); *see also Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) ("The FELA and Jones Act impose upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer's fault"). The purpose of the FELA is not to "add burdens to the business enterprises of the country, but rather to promote the welfare of *both* employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to . . . those who . . . ought to share the burden." S. Rep. No. 460, 60th Cong., 1st Sess. 4 (1908) (emphasis added).

In short, this Court consistently has recognized that the FELA was designed to provide a recovery to railroad workers only when their employers are at fault. In formulating and applying its general foreseeability test, however, the court of appeals in *Gottshall* and *Carlisle* essentially ignored the fault-based premise of the FELA. Thus, in *Gottshall*, the court repeatedly emphasized its belief that Gottshall's injuries were meritorious (as opposed to fraudulent) and that the FELA should provide relief for all meritorious injuries. *See, e.g., Gottshall*, App. at A-30 (common law distinctions to be discarded when they bar recovery on meritorious FELA claims); *id.* at A-35 (issue in FELA emotional distress cases is "whether the factual circumstances . . . provide a threshold assurance that there is a likelihood of genuine and serious injury"); *id.* at A-42 (emphasizing that at oral argument Conrail did not deny that Gottshall's claim was genuine). Indeed, the court did not recognize that the common law tests for recovery for emotional injury have any purpose aside from assuring the genuineness of a plaintiff's injury. *Gottshall*, App. at A-31 (common law tests for emotional injury designed to "glean the meritorious from the feigned and frivolous"); *see also Carlisle*, App. at A-81 (common law seeks to screen fraudulent emotional distress claims from the meritorious).

Moreover, the court of appeals' reliance on certain of this Court's decisions to support the creation of its "full recovery" rule is misplaced. In *Rogers v. Missouri Pacific*

R.R. Co., 352 U.S. 500, 506 (1957), this Court concluded that where "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought," the question of negligence is for the jury, even though the plaintiff could not demonstrate strict causation as required by the common law. In *Kernan v. American Dredging Co.*, 355 U.S. 426, 438-39 (1958), this Court held that the plaintiff could assert a negligence *per se* theory even though the regulation violated (requiring navigation lights to be set at a certain height above the water) was not designed to prevent the type of harm that resulted (an explosion caused by a navigation light placed too close to the water which was coated by flammable petroleum products). In *Urie v. Thompson*, 337 U.S. 163, 181-92 (1949), this Court held that an employee could recover for silicosis, a lung disease, even though the employee's injury was not the result of a sudden accident.

Significantly, none of these cases abandoned the common law, fault-based premise of the FELA in favor of a general foreseeability standard. Rather, they only made it easier for a plaintiff to establish a traditional negligence case: *Rogers* relaxed concepts of causation under the FELA; *Kernan* relaxed a technical restriction on principles of negligence *per se*; and *Urie* adopted a broader concept of the meaning of injury.

But this Court's pronouncements concerning liberal recoveries under the FELA do not lend support to allowing a cause of action under the FELA for the negligent infliction of emotional distress that is not recognized at common law. Rather, in the three cases cited by the court of appeals, the Court merely allowed otherwise weak traditional negligence cases to go to the jury. *Gottshall* and *Carlisle*, however, are much different. They do not represent the relaxation of traditional negligence principles or evidentiary standards. Rather, they both allow a substantive cause of action that is not recognized at common law – a cause of action for the negligent infliction of emotional distress where plaintiff has suffered no physical impact, was not in the zone of danger, and does not satisfy the bystander test of duty. In so doing, the cases essentially create a paradigm in which, in any case involving a "genuine" injury, foreseeability becomes the functional equivalent of fault. Thus, pursuant to *Gottshall* and *Carlisle*, the plaintiff presumably will recover as long as the injury was foreseeable, without regard to the employer's fault.

In *Gottshall* and *Carlisle*, the court of appeals departed from this Court's precedent. It rejected the prevailing common law negligent infliction of emotional distress principles – despite this Court's instruction in *Buell* that FELA negligent infliction of emotional distress law be informed by the common law. And, it did so on the basis of its view that the primary purpose of the FELA is to provide a recovery for all genuine injuries – despite this Court's repeated affirmation of the fault-based nature of the FELA. Moreover, the court of appeals justified its departure from *Buell* and its allowance of a cause of action under the FELA for negligent infliction of emotional distress that is not recognized at common law on three of this Court's cases – despite the fact that none of those cases supports discarding the common law to permit new causes of action under the FELA.

CONCLUSION

For the foregoing reasons, petitioner Consolidated Rail Corporation respectfully requests that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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No. 92-1956 (3)

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In The

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.
JAMES E. GOTTSHALL *and* ALAN CARLISLE,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 91-1926

JAMES E. GOTTSHALL,
Appellant,
v.
CONSOLIDATED RAIL CORPORATION,
Appellee.

Appeal From The United States
District Court For The
Eastern District Of Pennsylvania
(D.C. Civil Action No. 89-3102)

Argued: May 7, 1992
Before: BECKER, NYGAARD,
and ROTH, *Circuit Judges.*
(Filed: February 8, 1993)

OPINION OF THE COURT

NYGAARD, Circuit Judge.

James E. Gottshall appeals from a summary judgment in favor of Consolidated Rail Corporation in this action under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. In the context of the facts that follow, we will examine whether FELA recognizes negligent infliction of emotional distress as a basis for liability, and if so, define the contours of this liability. We will construe the facts in the light most favorable to Gottshall. *Metzger v. Osbeck*, 841 F.2d 518, 519 (3d Cir.1988). We hold that Gottshall has shown a sufficient basis to sustain his suit under FELA. Conrail is not entitled to judgment as a matter of law, and we will reverse and remand for further proceedings.

I.

On an exceedingly hot and humid August day during the summer of 1988, Conrail dispatched a work gang of nine men and among them were James Gottshall and his friend Richard Johns. The crew was supervised by Michael Norvick. Conrail sent its men to replace a stretch of defective tracks on the Watertown Secondary near Turbotville, Pennsylvania. Despite many technological advances in the railway industry, replacing steel rails still requires raw human labor. It remains heavy, strenuous work, requiring workers to unload, carry, saw, and drill holes in steel rails, and to extract spikes. Because trains were operating on the track, work did not begin until high noon when the temperature had exceeded 95 degrees. The temperature of the rail itself was 118 degrees. The track was out in the flats – in the open.

Most of the men were in their fifties and many were overweight. Conrail knew that one worker had suffered a serious heart attack. It also knew Johns was overweight, had high blood pressure and athero or arteriosclerotic cardiovascular disease, and was taking medication.

Conrail was on a strict time schedule because, as Gottshall explained, it had violated a railway safety regulation and knew it was scheduled for a safety inspection.

On this particular day Conrail drove its men hard; the pace of the work was unusually fast. Although conditions became increasingly inhospitable, the men were discouraged repeatedly from taking rest breaks except to get water on a need basis. As a practical matter it was difficult for workers to take unscheduled breaks because they often worked in teams. As Norvick stated, "We aren't going to stop our maintenance work because of the heat."

Under these stark conditions the men worked continuously for about two and a half hours until the work routine was unexpectedly disrupted. While Johns was cutting a rail, Gottshall saw him collapse. Gottshall and several men rushed to help their coworker. Norvick saw that Johns was pale and sweating profusely and realized he was having trouble with the weather conditions. They administered a cold compress and soon Johns regained consciousness. Ever aware of the time constraints on the work to be done, Norvick ordered the men to stop assisting Johns and to get back to work. They did so, leaving Johns with Norvick who neither took Johns from the worksite nor sought medical assistance. Five minutes later, Gottshall saw Johns stand up and collapse again.

Gottshall rushed to help his friend and saw that Johns was in trouble. Johns had turned white; his teeth had been knocked out by the fall; his eyes were rolled back; he was gasping for breath; his heart was fluttering; and saliva was drooling from his mouth. Gottshall realized Johns was suffering from a heart attack and began cardiopulmonary resuscitation. At one point Gottshall managed to restart Johns' heart, but only briefly. Although Gottshall was emotionally perturbed, and at times crying, he continued the cardiac procedure for about forty minutes while waiting for medical help.

This time Norvick realized Johns needed medical help immediately. The men had communication equipment, but that equipment was useless because on this particular day Conrail had taken the Turbotville base station off the air for repairs without notifying the men. Norvick was forced to physically seek help.

Rather than take the dying Johns to the nearest town, Norvick sped along an old country road to a firehall, only to find it closed. Sometime after the initial attempted distress call, the radio equipment apparently became operational and Norvick managed to reach a Conrail dispatcher. Norvick then raced to Agway Feed to place a 911 emergency call just in case the dispatcher's lines would not work. The worksite was isolated, so Norvick arranged to meet the medical help at a nearby road. When the paramedics arrived some thirty minutes to an hour later, he led them through a path to the worksite.

By this time, it was too late. Johns had died. His corpse was covered and laid on the gravel beside the track where it remained in the open, under the hot sun and in full view of the men until the coroner arrived, some three hours later. Meanwhile, Norvick ordered the men back to work because an empty coal train needed to use the railway line. When the men finished the work, Norvick ordered Gottshall and the others to stay at the worksite.

After the coroner finished, Gottshall and several men carried Johns' body to the ambulance parked in the distance. The coroner reported that Johns had died from a heart attack, precipitated by the excessive heat and humidity, combined with the heavy physical exertion. He also found that Johns did not receive prompt medical attention and that, had he, his chances of survival would have been significantly enhanced.

From the outset, the incident hit Gottshall hard. Other workers noticed he was emotional and upset during the ordeal. While he was giving CPR to Johns, he kept repeating, "Come on Dick, breathe, breathe." Even as the work crew returned from the worksite hours after Johns had died, a worker noticed Gottshall was still crying.

Johns was Gottshall's friend, and their friendship went beyond work. Johns often visited Gottshall to socialize. They spent time on the weekends, socializing and discussing the railway industry. Johns planned to join the National Historical Society of which Gottshall is a member. They attended union meetings, worked and took their meals together, and sometimes went drinking together. They had enjoyed this relationship for fifteen years. Conrail knew they were "personal friends."

When Gottshall returned to work the next morning, a Conrail supervisor reprimanded him for administering CPR to Johns. Otherwise, it was work as usual. The extreme weather conditions persisted. The men went back to the track and continued to work long, hard hours under the sun. Conrail did not implement scheduled breaks but water, as usual, was provided.

Gottshall began to feel sick and lost his appetite. He became preoccupied with the events surrounding Johns' death, and he became increasingly afraid that he would die under the same extreme conditions.

Johns' funeral was held the following weekend. The following Tuesday, Gottshall told his supervisor he was sick and was going home. The supervisor told him that he had to explain to the division engineer. As Gottshall recalled, "I had to explain to him after all of this heat and exhaustion, I'm getting sick and I can't take it, I'm going home and taking a couple of days off, and I just got sick and just couldn't go back anymore."

He returned home, retreated to his basement, and stayed there until his father found him several days later. Gottshall, along with the others who witnessed the accident, underwent a stress test given by their local union. The results indicated that the general consensus among the men was that the death was avoidable and that the men exhibited considerable depression and rage towards Conrail. The test identified Gottshall as suffering the most and recommended he seek medical treatment.

Gottshall was admitted to the Northwestern Institute of Psychiatry and remained there under the care of Dr. Byron Braid for about three weeks. Doctor Braid diagnosed that Gottshall was suffering from major depression and post-traumatic stress disorder. Gottshall was having suicidal preoccupations, anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares of the death scene and a fear of leaving home. During this time Gottshall lost forty pounds. Another psychiatrist, Dr. Gary Glass, and a clinical psychologist, Dr. Sharon Silberman, confirmed Dr. Braid's diagnosis. Since his discharge from the hospital, Gottshall has continued to receive out-patient psychological treatment.

Gottshall brought an action against Conrail under FELA, 45 U.S.C. § 51 et seq., seeking damages for emotional and physical injuries suffered and alleging that Conrail's negligence created the circumstances under which he was forced to watch and participate in the events surrounding the death of his friend. The district court reasoned that Gottshall's allegations failed to satisfy the elements of any of the recognized common law theories of liability, including the bystander and the zone of danger tests. *Gottshall v. Consolidated Rail Corp*, 773 F.Supp. 778, 781 (E.D.Pa.1991). It further reasoned that Conrail did not breach a general duty of care because it considered the failure to provide means of communication the only possible conduct breaching that duty and that Conrail could not have reasonably foreseen that such conduct would lead to Gottshall's injuries. Last, it applied the causation standard under Pennsylvania law and concluded that "Gottshall's injury was just too far down the causal chain, and as a result linking defendant's negligence to the harm treats the defendant like an insurer." *Id.* at 784. For these reasons the district court granted Conrail's motion for summary judgment, and Gottshall appeals, contending he is entitled to a trial on the merits under FELA.

II.

FELA creates a cause of action for railway employees who have been killed or injured by the railway's negligence. It provides:

> Every common carrier . . . shall be liable in damages to any person suffering *injury* while he is employed by such carrier . . . for such injury

> or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence. . . .

45 U.S.C. § 51 (emphasis added). The statute nowhere draws a distinction between claims for physical or emotional injury.

In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), the Supreme Court addressed whether negligent infliction of an emotional injury is actionable under FELA. The employee there brought a FELA action alleging that the railroad harassed, threatened and intimidated him and that as a result he suffered "a mental breakdown, and certain associated physical disorders." The Court first held that an employee retains his right to bring a FELA action for damages even though the injury was caused by conduct possibly subject to arbitration under the Railway Labor Act. 480 U.S. at 565-69, 107 S.Ct. at 1416-17. The Court then turned to the railway's contention that an employee's "wholly mental injury" was not compensable under FELA. It declined to resolve this issue, noting that the record was incomplete as to the exact nature of the allegedly tortious activity and the extent of the injuries allegedly suffered. It opined that "broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." *Id.* 480 U.S. at 570, 107 S.Ct. at 1418. Thus federal courts are left to develop the degree to which negligent infliction of emotional distress is actionable under FELA.

The *Buell* Court said, however, that federal courts should "glean [ ] guidance from common-law developments." *Id.* 480 U.S. at 568, 107 S.Ct. at 1417. So, we first look to the common law. In seeking guidance we are not limited to the law of the forum state, but instead must gauge the development of the common law from a broader base. *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 77 (3d Cir.1991).

A.

Among states, a majority recognizes a cause of action in tort for negligent infliction of emotional distress. See *Buell*, 480 U.S. at 569-71 & n. 20, 107 S.Ct. at 1418 & n. 20. But from recognition to application, the doctrinal divergence is great.

A minority employs the "physical impact" rule.[1] The rule requires a contemporaneous physical injury or impact to recover for negligent infliction of emotional distress. "[T]he purpose of the rule requiring physical impact is to prevent 'illusory or imaginative or faked' claims." *Zelinsky v. Chimics*, 196 Pa.Super. 312, 318, 175 A.2d 351, 354 (1961). See Restatement (Second) of Torts, § 436A, comment b (1965).

A large majority of jurisdictions employs either the "zone of danger" or "physical manifestation" rules. See supra n. 1, Comment, 33 Vill.L.Rev. at 796-98 & n. 91; Restatement §§ 313, 436, 436A. The zone of danger rule permits recovery for emotional injuries resulting from witnessing physical harm to another or from fearing physical harm to oneself, provided that plaintiff was actually threatened by physical harm. The physical manifestation rule requires that plaintiff exhibit a physical injury or symptom as the direct and natural result of the initial emotional distress suffered.

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[1] See Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitations Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill.L.Rev. 781, 792-93 n. 59 (1988) (as of 1988 five states plus the District of Columbia have adopted this rule).

Many jurisdictions also permit a bystander to recover for emotional injuries. The quintessential common law case involves the mother who witnesses the death of her child. See *Dillon v. Legg*, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968) (en banc). See generally Comment, 33 Vill.L.Rev. at 806-07 n. 139 (as of 1988 at least ten states have adopted the *Dillon* approach). The Supreme Court of California restated the *Dillon* bystander test as this: Plaintiff can recover if she (1) is present at the accident scene at the time it occurs and contemporaneously perceives the injury to the victim, (2) suffers serious emotional distress as a result of watching the injury, and (3) is closely related to the injured victim. *Thing v. La Chusa*, 48 Cal.3d 644, 668-69, 257 Cal.Rptr. 865, 771 P.2d 814 (1989). As for the last factor, the court limited recovery to relatives residing in the same household, parents, siblings, children, and grandparents of the victim. 257 Cal.Rptr. at 880 n. 10, 771 P.2d at 829 n. 10.

While some jurisdictions require that the plaintiff and the victim stand in some familial relationship, others seem to suggest a showing of strong emotional ties will suffice. See *Champion v. Gray*, 420 So.2d 348, 353 (Fla.App.1982), "decision quashed" 478 So.2d 17, 20

(Fla.1985); *Versland v. Caron Transp.*, 206 Mont. 313, 671 P.2d 583, 587 (1983); *Paugh v. Hanks*, 6 Ohio St.3d 72, 79-80, 451 N.E.2d 759, 766-67 (1983); *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974); *Hunsley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096, 1103 (1976); *Toms v. McConnell*, 45 Mich.App. 647, 207 N.W.2d 140, 144-45 (1973); *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668, 670 (1979). Thus a plaintiff must show physical, temporal, and relational proximity.

Although these common law tests seem as different as they are arbitrary, and have been so criticized, they share common roots. While severe emotional injuries can be just as debilitating as physical injuries, they are not as manifest. One can see frayed skin, but one cannot see frayed nerves; hence, an emotional injury is easier to fake. These tests therefore have been judicially developed to screen causes of action and send only the meritorious ones to juries.

As an unfortunate product of this thinking, the focus shifted from traditional principles of liability to mechanical adherence to these tests, which are based upon a theory that liability is the extraordinary exception. Thus, even in cases of gross negligence resulting in reasonably foreseeable injuries, common law courts preserve the limits of the established rules, thereby precluding recovery for many meritorious claims.[2]

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[2] See for example, *District of Columbia v. Smith*, 436 A.2d 1294 (D.C.1981) (negligent failure to inform next of kin about death of loved one is noncompensable absent physical impact); *Woodman v. Dever*, 367 So.2d 1061 (Fla.Dist.Ct.App.1979) (a child who witnessed robbery and sexual assault of mother was

B.

These common law tests provide instruments that are intended to separate the meritorious claims from the others, but they do not necessarily etch the contours of the federal right. While we assume that "FELA jurisprudence gleans guidance from common-law developments," *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417 (citing *Urie v. Thompson*, 337 U.S. 163, 172-74, 69 S.Ct. 1018, 1026, 93 L.Ed. 1282 (1949)), we are not called upon to resolve matters of state law, nor predict how state courts would resolve them. Cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 364 (3d Cir.1990). Determining FELA liability is distinctly a federal question. *Urie*, 337 U.S. at 174-78, 69 S.Ct. at 1027-28.

While federal courts uniformly agree that claims for negligent infliction of emotional distress are cognizable under FELA, they are badly splintered as to the elements necessary to bring such a claim.

The Court of Appeals for the Seventh Circuit has held that FELA does not create a cause of action for emotional injuries absent actual or threatened physical impact. *Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir.1991) (quoting *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir.1985) (pre-Buell case) ("the critical question in this case is simply whether [plaintiff] has stated a claim under the FELA, which means a claim for a violation of one of the traditional 'physical' torts, such as assault, battery, and negligent infliction of personal injury, all of which are torts actionable under the [FELA]")). Accord *Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95, 98 (7th Cir.1988); *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1025 (7th Cir.1989).

The Court of Appeals for the Ninth Circuit has taken the position that purely emotional injuries are compensable under FELA, though it has yet to delineate the circumstances in which recovery is permitted. *Taylor v. Burlington N. R.R. Co.*, 787 F.2d 1309, 1313 (9th Cir.1986) (pre-Buell case). See *Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366, 1372 n. 2 (9th Cir.1987) (applying the "eggshell plaintiff" doctrine to emotional claims if injury results in physical manifestation, in this case a heart attack).

The Court of Appeals for the Sixth Circuit has decided that FELA does not recognize a claim for *intentional* infliction of emotional distress resulting in purely emotional injuries. *Adkins v. Seaboard Sys. R.R.*, 821 F.2d 340, 342 (6th Cir.1987). It has yet to decide whether a claim for negligent infliction of emotional distress without verifiable physical manifestation is actionable. See *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 426 (6th Cir.1988); *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir.1990). But in *Stoklosa* and *Adams*, the court took two potentially contradictory views of an employer's duty to its employees to provide an "emotionally safe" workplace.

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denied recovery because there was no physical impact on the child); *James v. Harris*, 729 P.2d 986 (Colo.Ct.App.1986) (parents who witnessed their child being run over by a car could not recover because they were not within the zone of danger).

In *Stoklosa* the court concluded that an employer's duty is defined by whether its conduct could be reasonably foreseen to cause an employee's emotional distress. 864 F.2d at 426. In *Adams,* however, the court concluded that "an employer has not breached its duty to provide an emotionally safe workplace unless the employer (acting through its agents) engages in 'unconscionable abuse' of an employee." 899 F.2d at 540.[3]

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[3] We believe that the logic in *Adams* is flawed. By requiring "unconscionable abuse" as a prerequisite for recovery for purely emotional injury, the court relied on *Netto v. Amtrak,* 863 F.2d 1210 (5th Cir.1989) and footnote 13 in *Buell.* But *Netto* involved a claim for intentional infliction of emotional distress, 863 F.2d at 1214 n. 4, while the claim in *Adams* involved negligent infliction of emotional distress. This distinction is critical. Footnote 13 in *Buell* addressed the railway's contention that if claims for emotional injuries are cognizable under FELA, no employee will pursue grievance through the Railway Labor Act since every aggrieved worker will undoubtedly have suffered some degree of emotional anguish. The Court responded:

> This parade of horribles mistakenly assumes that a significant percentage of employees bringing grievances suffer the type of severe emotional injury that has generally been required to establish liability for purely emotional injury, and that a significant percentage of employees are subject to the type of *unconscionable abuse* which is prerequisite to recovery. In *Farmer v. Carpenters,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), we held that a state action for *intentional infliction* of emotional distress was not pre-empted by the National Labor Relations Act (NLRA), and pointed out that the risk of interference with the NLRA was minimized by the fact that state law permitted "recovery only for emotional distress sustained as a result of 'outrageous' conduct."

480 U.S. at 567 n. 13, 107 S.Ct. at 1416 n. 13 (emphasis added). The Court here was discussing a claim for intentional infliction

The Court of Appeals for the Fourth Circuit requires plaintiff to show outrageous conduct as a predicate to a claim for negligent infliction of emotional distress under

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of emotional distress. Such claims require unconscionable or outrageous action. See William Prosser, The Law of Torts, § 12, at 60-65 (5th ed. 1984); Restatement § 46; *Womack v. Eldridge,* 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974); *Fischer v. Maloney,* 43 N.Y.2d 553, 557, 402 N.Y.S.2d 991, 992-93, 373 N.E.2d 1215, 1217 (1978). Indeed the Court proceeded to distinguish claims for negligent and intentional infliction of emotional distress, concluding:

> [W]hether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity. . . . In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

480 U.S. at 569-70, 107 S.Ct. at 1417-18. Thus the Court did not intend to make unconscionable conduct a prerequisite for bringing a claim for emotional distress.

We fail to see why unconscionable conduct is required to bring a claim for *negligent* infliction of emotional distress. Even common law does not require it. See *Brown v. Cadillac Motor Car Div.,* 468 So.2d 903, 904 (Fla.1985); *Rickey v. Chicago Transit Auth.,* 98 Ill.2d 546, 550, 75 Ill.Dec. 211, 457 N.E.2d 1 (1983). Indeed, requiring outrageous conduct is logically inconsistent with the statute. The language of FELA refers to negligence only. The statutory language, however, has been extended to include liability for some intentional torts. See *Jamison v. Encarnacion,* 281 U.S. 635, 641, 50 S.Ct. 440, 442, 74 L.Ed. 1082 (1930). In this context, we find it odd that coverage is provided in an intentional tort, yet excluded when the injury arises out of negligence, specifically referred to in the statute, just because the plaintiff suffered an emotional injury.

FELA, thus taking the same position as the Sixth Circuit *Adams* court. *Elliott v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1229 (4th Cir.1990) (citing *Buell*, 480 U.S. at 565-67 n. 13, 107 S.Ct. at 1416 n. 13; *Netto*, 863 F.2d at 1214-15). It declined to decide whether one may recover under FELA for purely emotional injuries without additional physical symptoms. *Id.*

The Court of Appeals for the First Circuit understands *Buell* as "an attempt to leave the door to recovery for wholly emotional injury somewhat ajar but not by any means wide open." *Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 694 (1st Cir.1987). The court declined "to make this a pioneer case exploring the frontier possibility opened up by *Buell*" and rejected plaintiff's claim because he failed to show causation between the alleged injury and the tortious conduct. *Id.* at 694, 696. Likewise, in *Robert v. Consolidated Rail Corp.*, 832 F.2d 3 (1st Cir.1987), the court avoided the issue and held that plaintiff failed to establish that Conrail could have reasonably foreseen that he would suffer a heart attack from stress of which Conrail was never informed. It declined to resolve whether a heart attack induced solely by stress and not accompanied by any precipitating physical injury is a compensable injury. *Id.* at 7. But see *Pierce*, 823 F.2d at 1372 n. 2 (emotional distress leading to heart attack is actionable under FELA).

The Court of Appeals for the Fifth Circuit has decided a series of cases on this issue. In *Hagerty v. L & L Marine Serv., Inc.*, 788 F.2d 315 (5th Cir.1986) (pre-*Buell* case), plaintiff was drenched with toxic, carcinogenic chemicals and suffered emotional injuries arising from cancerphobia. The court concluded that FELA allows plaintiffs to recover for psychic and emotional harm because it was intended to provide broad coverage for all work-related "injuries" whether characterized as physical or mental. *Id.* at 318. On reconsideration, the court modified *Hagerty*, stating that a plaintiff may recover for serious mental distress assuming an "actionable injury." 797 F.2d 256 (1986).

In *Netto v. Amtrak*, 863 F.2d 1210 (5th Cir.1989) the court declined to decide whether a plaintiff may recover for purely emotional injuries under FELA because he had failed to show any evidence of unconscionable or outrageous conduct. *Id.* at 1214. While the Sixth Circuit position in *Adams* and the Fourth Circuit position in *Elliott* purportedly adopted the *Netto* holding, it is clear *Netto* is of a different genre because the court emphasized that the claim was only for intentional infliction of emotional distress. *Id.* at 1214 n. 4. The *Netto* court did not require unconscionable conduct for all claims for emotional distress. Rather, since it was presented with a claim based on intentional infliction of emotional distress only, it had no occasion to discuss negligent infliction of emotional distress. See supra n. 2.

In *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir.1989), a seaman saw his half-brother crushed to death and sued under the Jones Act.[4] The facts indicate that plaintiff, in some capacity, was not merely a witness, but was an active participant in the events: "Gaston [plaintiff] fell to the deck; but James [victim] slipped between the barge and the vessel and was crushed to death, despite Gaston's efforts to pull him to safety." *Id.* at 817. The court refused to provide recovery for an emotional injury stemming from witnessing the violent death of a relative, reasoning that the plaintiff's injury was the result of watching another person die and was not a result of fear for his own safety. It thus rejected the bystander rule of liability and required that plaintiff be in the zone of danger to recover for emotional distress. *Id.* at 819 (restricting *Hagerty* as a "physical impact" case). The court left open the question whether a purely emotional injury is cognizable. *Id.* at 821.

In *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260 (5th Cir.1991), the plaintiff sued under the Jones Act for emotional harm suffered as a result of sexual harassment. The evidence showed that the plaintiff was subjected to tortious physical contact and that she suffered physical manifestations of harm, including weight loss, vomiting, and diarrhea. *Id.* at 265. The court held that in these circumstances the plaintiff's claim was cognizable under the Jones Act. The court did not reach the issue of whether a purely emotional injury would be cognizable. *Id.* at 266 n. 8.

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[4] The Jones Act incorporates FELA. 46 U.S.C. § 688; *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511 (1957).

In *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir.1991), the plaintiff, a tug boat captain with over 30 years experience, witnessed an explosion when a barge ruptured a pipeline. He helped to ease the emergency by moving several vessels to safety. No one was injured in the accident. Soon thereafter, he developed post-traumatic stress disorder and depression resulting from his belief that he could have been injured or killed. He sought to recover under the Jones Act for a purely emotional injury.

After thoroughly reviewing the case law and the different theories of recovery under common law, the court concluded that a plaintiff may recover if the injury resulted from a situation in which a reasonable person, normally constituted, would not be able to cope adequately with the mental distress arising from the circumstances. *Id.* at 1010. It reasoned "one who has suffered a significant emotional injury should not be denied recovery simply because the factual scenario does not satisfy some earlier-selected, fictitious method of authenticating the injury." *Id.* at 1011. The court stated in a broad stroke:

> Excepting our colleagues in the Ninth Circuit, our circuit brethren have indicated a reluctance to field the *Buell* pitch. We end that reluctance today, persuaded that an emotional injury can be every bit as harmful, debilitating, and destructive of the quality of one's life as a physical injury. We therefore hold that a claim for an emotional injury caused by emotional distress negligently inflicted, even without an accompanying physical injury or physical contact, is cognizable under the FELA.

Id. at 1009. Because one would not expect an experienced seaman to have such emotional reactions to fires in the oilfield, the court concluded that the injury was not a reasonably foreseeable consequence and therefore the claim was not cognizable. Indeed, the treating psychiatrist testified that he was baffled by the plaintiff's reaction to the accident.

The Court of Appeals for the Fifth Circuit granted en banc rehearing. 954 F.2d 266 (1992). The en banc court agreed that the plaintiff's claim was not cognizable even under the most liberal theory of recovery. 966 F.2d 166 (1992). The court, however, concluded that the facts did not permit the court to decide whether a claim for purely emotional injuries is cognizable. It emphasized that *Gaston* continued to represent the law of the circuit. "The [*Gaston*] court recognized that a plaintiff suing for purely emotional injuries could recover if he also suffered physical injury. The court also determined that a bystander could not recover for merely witnessing harm to another where the plaintiff suffered no harm or threat of harm." *Id.* at 169. But the en banc court believed that *Gaston* left open the question whether a claim for purely emotional injury under a zone of danger theory is cognizable. *Id.*

It is clear that there are open conflicts among the circuits.[5] A review of the decisions in other circuits in the

wake of *Buell* indicates that there is no common discernable principle, test, view or attitude.

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[5] In view of these conflicts, Justices White and Thomas believe that "a uniform rule should be announced by this Court on this important and recurring issue." *Ray v. Consolidated Rail Corp.*, ___ U.S. ___, ___, 112 S.Ct. 914, 914, 116 L.Ed.2d 813 (1992) (dissenting from a denial of certiorari); *Carroll v. Consolidated Rail Corp.*, ___ U.S. ___, ___, 112 S.Ct. 916, 916, 116 L.Ed.2d 816 (1992) (same).

The jurisprudence among the district courts is no more consistent. See for example, *Kiffe v. Neches-Gulf Marine, Inc.*, 709 F.Supp. 743, 745 (E.D.Tex.1989) (worker who witnessed death of coworker and who suffered purely emotional injuries failed to state a claim); *Welby v. Consolidated Rail Corp.*, 671 F.Supp. 1015, 1021 (M.D.Pa.1987) (heart attack suffered as a result of improper and unsafe working conditions was actionable); *Gillman v. Burlington N. R.R. Co.*, 673 F.Supp. 913, 917 (N.D.Ill.1987) (emotional distress claim is actionable only if it satisfies the zone of physical danger test), affirmed, 878 F.2d 1020 (7th Cir.1989); *Teague v. National R.R. Passenger Corp.*, 708 F.Supp. 1344, 1350 (D.Mass.1989) ("[T]his Court therefore rejects the *Gillman* approach to the extent that it permits recovery *only* if the 'zone of danger' test is satisfied. In addition to permitting recovery under such circumstances, the Court also adopts the common law majority rule that actual or threatened impact is unnecessary to a negligent infliction of claim under FELA and that objective symptomatology of the mental distress will suffice.") (emphasis in original); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135, 144 (S.D.N.Y.1987) (suicide as a result of harassment is actionable); *Amendola v. Kansas City S. Ry. Co.*, 699 F.Supp. 1401, 1411 (W.D.Mo.1988) (mental anguish resulting from fear of contracting asbestos-related diseases is not actionable absent manifestations of physical injury); *Masiello v. Metro-North Commuter R.R.*, 748 F.Supp. 199, 205 (S.D.N.Y.1990) (emotional distress with an accompanying physical manifestation is actionable); *Smolsky v. Consolidated Rail Corp.*, 780 F.Supp. 283, 291 (E.D.Pa.1991) (harassment resulting in purely emotional injuries is actionable).

C.

We have refused to designate a particular common law test as *the* test in this circuit, choosing instead to take an ad hoc approach that focuses more on the facts rather than rules of law. In *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir.1990), Holliday brought a FELA action against the railroad alleging that he was injured from the stress created when Conrail forced him to work on a job for which he claimed to have been unqualified. We held that the facts in the light most favorable to Holliday, considering the character of the allegedly tortious activity (putting him in a position for which he was unqualified) and the lack of physical impact on him, could not support a FELA claim. *Id.* at 427.

Holliday's claim was essentially for emotional injuries suffered from job stress. If an employee showing some possible negligence with psychological consequences will always present a jury question, even the most attenuated claims could be advanced. Because claims for negligent infliction of emotional distress are so fact-dependent, we declined to make broad pronouncements that could restrict future meritorious claims. We did not hold that there could not be a recovery for emotional injuries unless the plaintiff suffers a physical injury or unless there is an accident, as we did not need to reach these issues. We stressed that the allegedly tortious activity did not result in a physical injury to another party, which Holliday witnessed, or indeed injury to another party at all. In fact, there was no accident. Thus "our opinion is narrow." *Id.* at 426.

In *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3rd Cir.1991), Outten brought a FELA action for emotional injuries he sustained when he saw two railway cars were about to collide. There was a collision, but it took place a full mile away from Outten. Outten did not see the accident because he was running in the other direction and, like Holliday, no one was hurt. Outten failed to show how the railway breached a duty: He was neither a bystander who witnessed a closely-related person injured, see *Dillon v. Legg*, nor an active participant in the injury-causing event, see *Althoff v. Consolidated Rail Corp.*, 1988 WL 61734, 1988 U.S.Dist. Lexis 5343 (E.D.Pa.1988) (when a worker operated the instrumentality that killed a coworker, he became an "active participant" in the accident through the employer's negligence). There was thus no "solid basis in the present state of common law" to permit recovery. 928 F.2d at 79. Because the Supreme Court has cautioned us to finely scrutinize the facts of the case, we declined to devise a generally applicable litmus test for FELA claims based on negligent infliction of emotional distress.

The core of the problem lies in the fundamental tension between two conflicting policies. On the one hand, common law doctrines are built on the suspicion that emotional distress claims are subject to fraud and frivolity. In *Outten* we rejected the notion that FELA liability extends to emotional injuries suffered when an employee "reasonably feared personal physical injury," believing such a rule would remove reasonable limits on these types of claims. 928 F.2d at 79. And in *Holliday* we adopted the policy considerations set forth in *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073, 1090

(E.D.Pa.1989): a need to prevent incalculable and potentially unlimited damages, a flood of litigation, and fraud. 914 F.2d at 424.

On the other hand, contrasting the often harsh and arbitrary doctrines of the common law is the policy underlying FELA itself. FELA was enacted in broad, open-ended terms so that recovery will be liberally granted and that an employer's standard of conduct will be malleable, and adapt to the changing realities of industrial conditions and standards. While courts must be neither an instrument for the opportunistic con-artist nor an understanding shoulder for the emotionally frail, we must follow Congress' mandate. So we must reconcile the two policies, discerning the trends and developments in common law and then gauging them according to the policy underlying FELA, for FELA is at issue here and creates the cause of action.

D.

Congress promulgated FELA to provide recovery in meritorious cases and to remedy deficiencies in the common law. At common law the liability of the master to his servant was predicated on generally applicable tort laws. The road to liability was treacherous, requiring the servant to negotiate through various defenses designed to limit liability. This limited liability insulated fledgling industries, too weak to "bear[ ] the 'human overhead' which is an inevitable part of the cost – to someone – of the doing of industrialized business." *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 59, 63 S.Ct. 444, 447, 87 L.Ed. 610 (1943). As railways prospered and grew strong and because workers lacked the economic and bargaining power to provide for their safety, the policy shifted to place the burden of the "human overhead" on the railway industry. *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 397-98, 2 L.Ed.2d 382 (1958). The statute considered the railway industry as a "unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 330, 78 S.Ct. 758, 762, 2 L.Ed.2d 799 (1958). FELA therefore provides compensation for the fatalities and injuries the railway industry inevitably imposes. *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 69 S.Ct. 413, 420, 93 L.Ed. 497 (1949) (Douglas concurring).

Although FELA is predicated on common law negligence principles, *Chesapeake & Ohio Ry. Co. v. Stapleton*, 279 U.S. 587, 589-90, 49 S.Ct. 442, 443, 73 L.Ed. 861 (1929), instead of a detailed statute codifying them Congress enacted the statute in general terms. See 45 U.S.C. § 51. Congress left the onus of fashioning remedies to the courts in a manner analogous to the development of common law tort remedies. *Kernan*, 355 U.S. at 431-33, 78 S.Ct. at 398. But it is clear that courts should liberally grant relief. And it is equally clear that "Congress did not intend to create a static remedy, but one which would be developed and *enlarged* to meet the changing conditions and changing concepts of industry's duty toward its workers." *Id.* (emphasis added). See *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524, 69 S.Ct. 275, 277, 93 L.Ed. 208 (1949) ("Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages."); *Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1165 (3d Cir.1992) (concurrence) ("[FELA] ensures that a common carrier's duties include, and extend, the spectrum of common law standard of recovery.") (emphasis in original); *Ackley v. Chicago & N.W. Transp. Co.*, 820 F.2d 263, 267 (8th Cir.1987) ("duty to provide a reasonably safe place of work . . . is broader under the statute than a general duty of due care"). See also *Jamison*, 281 U.S. at 638-41, 50 S.Ct. at 442 (extending the scope of FELA liability to cover some intentional torts even though the language of the statute refers only to negligent conduct).

Thus many traditional impediments to recovery found in common law have been eradicated by FELA itself or by the courts following the intent and dictates of the Act. "A primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Buell*, 480 U.S. at 561, 107 S.Ct. at 1413. We see evidence of this in the statute. At common law the doctrines of contributory negligence and assumption of the risk produced harsh and unfair results, often barring recovery for the victim. But sections 53 and 54 of FELA respectively, limit the application of these defenses. At common law an at-will employee may be fired for any or no reason. See for example, *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174, 176 n. 4 (1974). But section 60 prohibits an employer from blocking or otherwise regulating the free flow of information concerning a FELA matter, including prohibiting retaliatory discharge of an employee who furnishes such information. And section 55 prohibits an employer from contracting to limit or otherwise regulating its FELA liability.

Some of the inequities the statute did not eradicate, the courts have. In *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), the Court expounded upon the relationship between FELA and the common law:

> [FELA] was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.

352 U.S. at 507-08, 77 S.Ct. at 449. Thus the Court did away with the strict requirements of causation in common law and replaced it with the inquiry of "simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* 352 U.S. at 506, 77 S.Ct. at 448.

In *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958) an employee was killed because the employer violated a regulation that required a navigation light to be at a certain height above the water to provide visibility for passing ships. Because the light was too low, it ignited fumes and caused an explosion. The Supreme Court held that the violation constituted negligence per se under section 51.

Traditionally, common law limited the negligence per se doctrine to injuries the statute was designed to prevent. See Restatement § 286, Comment on Clause (c). The Court, however, rejected this common law limitation and concluded that FELA liability springs from the violation of statutory duty regardless of the common law limitation. 355 U.S. at 437-39, 78 S.Ct. at 401. The Court succinctly articulated the theory and purpose of FELA liability:

> The courts, in developing the FELA with a view to adjusting equitably between the worker and his corporate employer the risks inherent in the railroad industry, have plainly rejected many of the refined distinctions necessary in common-law tort doctrine for the purpose of allocating risks between persons who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved. . . . [T]he theory of the FELA is that where the employer's conduct falls short of the high standard required of him by this Act, and his fault in whole or in part, causes injury, liability ensues.

Id. Because the worker and the railway employer do not stand on equal footing, and because railway employment remains dangerous, FELA was intended to adjust the equities. See *Sinkler*, 356 U.S. at 329-31, 78 S.Ct. at 762.

In *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), the Court allowed an employee to recover for silicosis, a lung disease, even though the statute violated was designed to ensure an adequate auxiliary braking system and not to protect employees against silicosis. Again the Court disregarded common law limitations:

> To read into this all-inclusive wording [of FELA] a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this court.

337 U.S. at 181-82, 69 S.Ct. at 1030. The Court again stressed that FELA creates the cause of action and that FELA grants relief for meritorious claims for injuries as a result of an employer's negligent conduct.

The *Buell* Court cited *Rogers* and *Urie* for the proposition that causation in a FELA action is a lenient inquiry and that FELA is to be given a liberal construction. 480 U.S. at 560-62 n. 8, 562-64, 107 S.Ct. at 1413 n. 8, 1414. The policies underscoring *Rogers*, *Kernan* and *Urie* – the humanitarian purpose of shifting the costs of "human overhead" to the railway industry – remain as vital today as then and do not change with the nature of the injury. See *Urie*, 337 U.S. at 181, 69 S.Ct. at 1030 ("The wording [of FELA] was not restrictive as to . . . the particular kind of injury resulting.").

While the long-standing fundamental elements of bringing a FELA action are traditional common law elements, *Robert*, 832 F.2d at 6, in many ways FELA is the antithesis of the common law. FELA imposes upon carriers a higher standard of conduct and has eliminated many of the refined distinctions and restrictions that common law imposed to bar recovery (even on meritorious claims). FELA liability and common law liability are thus different. The inexorable conclusion is: State law tests are not the *sine qua non* for determining whether plaintiff has a cognizable FELA claim and doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims.[6]

Although several courts of appeals have adopted to the letter or rejected one or more of the common law tests, we find it unnecessary, and indeed undesirable, to do so for as one district court astutely observed, such a solution leads to chaos: "the federal courts in the fifty states might produce as many as fifty versions of what should be unified federal law." *Teague*, 708 F.Supp. at 1348 n. 5. Cf. *Lancaster*, 773 F.2d at 813 (7th Cir.) (adopting the physical impact and zone of danger tests); *Gaston*, 866 F.2d at 819 (5th Cir.) (adopting the physical impact and zone of danger tests and rejecting the bystander test); *Netto*, 863 F.2d at 1214 (5th Cir.) (requiring unconscionable conduct for claims based on intentional infliction of emotional distress); *Adams*, 899 F.2d at 540 (6th Cir.) (requiring unconscionable conduct for claims based on negligent infliction of emotional distress); *Elliott*, 910 F.2d at 1229 (4th Cir.) (same). By focusing on these exceptions, courts have gone their separate ways while ignoring the one thing that should unite them – the broad remedial scope of FELA. And by strictly adhering to them, we would, as some common law courts have chosen to do, preclude a great number of meritorious claims.

As we have seen, the common law has developed many doctrines and elaborate rules when dealing with emotional harm claims. At the heart of all these doctrines and rules lies but one function, to glean the meritorious from the feigned and frivolous. See Restatement § 436 A, comment b. For example, the physical impact and zone of danger rules are based on the notion that a plaintiff who has been subjected to or threatened with the negligent force would be less likely to fake a claim and would likely suffer genuine and severe emotional injuries. See *Neff v. Lasso*, 382 Pa.Super. 487, 555 A.2d 1304, 1307 (1989); *Zelinsky*, 175 A.2d at 354. And the physical manifestation rule is based on the notion that physical symptoms of emotional distress show that the plaintiff "really" suffered an injury. *Payton v. Abbott Lab.*, 386 Mass. 540, 437 N.E.2d 171, 175 & n. 5 (1982). See *Molien v. Kaiser Foundation Hosp.*, 27 Cal.3d 916, 167 Cal.Rptr. 831, 838, 616 P.2d 813, 820 (1980) ("It supposedly serves to satisfy the cynic that the claim of emotional distress is genuine."). The Supreme Court has long recognized that emotional distress and suffering are compensable under FELA, so long as that emotional distress can be objectively validated to a sufficient degree by a precipitating physical injury. *Erie R.R. Co. v. Collins*, 253 U.S. 77, 85, 40 S.Ct. 450, 453, 64 L.Ed. 790 (1920) (plaintiff's emotional distress, including "shame and humiliation" and "mental pain," is cognizable under FELA when validated by a physical mutilation and disfigurement), overruled on other grounds, *Chicago & E. Ill. R.R. Co. v. Industrial Comm'n*, 284 U.S. 296, 299, 52 S.Ct. 151, 152, 76 L.Ed. 304 (1932). See *East Ala. Express Co. v. Dupes*, 271 Ala. 504, 124 So.2d 809 (1960) (plaintiff who sustained whiplash and fracture allowed to recover for her "worry" about the future result of her injury). "The problem from this perspective is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false." The Law of Torts, § 54, at 361.

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[6] See *Urie*, 337 U.S. at 174, 69 S.Ct. at 1027 ("What constitutes negligence for the statute's purpose is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes."); *id.* 337 U.S. at 196, 69 S.Ct. at 1038 (Frankfurter concurring) ("At the risk of wearisome reiteration it is relevant to say again that the common-law concept of negligence is an antiquated and uncivilized basis for working out rights and duties for disabilities and deaths inevitably due to the conduct of modern industry."); *Sinkler*, 356 U.S. at 329, 78 S.Ct. at 762 ("However, in interpreting the FELA, we need not depend upon common-law principles of liability. This statute [is] an avowed departure from the rules of the common law. . . . "); *Kernan*, 355 U.S. at 438, 78 S.Ct. at 401 ("[Courts have] plainly rejected many of the refined distinctions necessary in common-law tort doctrine. . . . "); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361, 72 S.Ct. 312, 314, 96 L.Ed. 398 (1952) ("State laws are not controlling in determining what the incidents of this federal right shall be.").

That which distinguishes merit from fraud and frivolity most often depends on one issue – whether there was injury in fact reasonably attributable to the negligent conduct – for the law does not reward those who did not suffer injuries or whose injuries are trivial, or those who are faint of heart. See Restatement § 46 comment j. Dean Prosser suggests:

> It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case.

* * *

> What all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious. There may perhaps be other such cases. Where the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery.

The Law of Torts, § 54, at 361, 362. See *Johnson v. New York*, 37 N.Y.2d 378, 383-84, 372 N.Y.S.2d 638, 643, 334 N.E.2d 590, 593 (1975) ("recovery for emotional harm to one subjected directly to the tortious act may not be disallowed so long as the evidence is sufficient to show causation and substantiality of the harm suffered, together with a 'guarantee of genuineness' "); *Rodrigues v. State*, 52 Haw. 283, 52 Haw. 156, 472 P.2d 509, 520 ("the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case"); Restatement § 436 A, comment b ("in the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbance may be too easily feigned"). Thus the contours of the common law rules of liability (and preclusion) can best be understood as encompassing, albeit crudely, only those special situations most likely to present a claim with sufficient indicia of genuineness. See The Law of Torts, § 54, at 360-66; *Hagerty*, 788 F.2d at 318.

But the guarantee is not fixed by the limited set of circumstances the common law has ordained. The common law tests provide only a dubious method for assuring that the injury is genuine. We find guidance in

Hagerty, where the Court of Appeals for the Fifth Circuit rejected the common law's doctrinal and definitional prerequisites for bringing an emotional distress claim:

> The physical injury requirement, like its counterpart, the physical impact requirement, was developed to provide courts with an objective means of ensuring that the alleged mental injury is not feigned. We believe that notion to be unrealistic. It is doubtful that the trier of fact is any less able to decide the fact or extent of mental suffering in the event of physical injury or impact. . . . The circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness. It is for the jury to decide questions such as the existence, severity and reasonableness of the fear.

788 F.2d at 318 (citation omitted). See *Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 999-1000, 152 N.E.2d 249, 252 (1958) (cancerphobia as a result of negligent X-ray treatment is actionable as the court found a "guarantee of genuineness [of the cancerphobia] in the circumstances of the case"); *Molien*, 616 P.2d at 821 (a false diagnosis of spouse having syphilis is sufficient to provide a guarantee of genuineness and allow recovery for a purely emotional injury). See also *Elden v. Sheldon*, 46 Cal.3d 267, 284, 250 Cal.Rptr. 254, 758 P.2d 582 (1988) (Broussard dissenting) ("In my view, recovery should not be cut off on arbitrary, definitional grounds but on functional grounds that correspond with real loss. As the commentators have suggested, the problem should be solved by the application of the principles of tort, not by the creation of exceptions to them.").

The solution is not found in rules of law so much as in an active scrutiny of the facts. The search for the guarantee is a fluid analysis, and it "is not necessarily an abstract point of law . . . that might be answerable without exacting scrutiny of the facts of the case." *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417. Although a fact-specific analysis may mean losing the comfort and security that bright-line, arbitrary rules afford, FELA jurisprudence cannot be reduced to a set of rules that mechanistically drive results without exacting scrutiny of the facts as they bear upon such considerations as the employer's duty to provide a safe workplace, the nature of the alleged tortious conduct, the injury, and the underlying equities. "[A]s Judge Becker noted in a very different context [ ] 'developing the law on a case-by-case basis and drawing lines depending on the facts is the stuff of judging.' " *Holliday*, 914 F.2d at 427 (citation omitted) (quoting *United States v. Balascsak*, 873 F.2d 673, 685 (3d Cir.1989) (concurrence)). See *Ries*, 960 F.2d at 1167 (concurrence) ("The development of FELA, like common law principles, should proceed on a case by case [basis]."). We implicitly recognized that we would not limit our inquiry to the common law rules of law when we adopted the "active participation" rule of liability explained in *Althoff*, for that rule does not fall within the parameters of any common law theory of liability. See *Outten*, 928 F.2d at 79.

III.

The issue is whether the factual circumstances here provide a threshold assurance that there is a likelihood of genuine and serious emotional injury. We look not to any specific fact or standard, but to the totality of the factors.

Thus, one consideration is whether plaintiff has a "solid basis in the present state of common law to permit him to recover." *Outten*, 928 F.2d at 79.

We first consider the common law bystander theory of recovery. Had Gottshall and Johns been father and son this would represent the classic common law claim. In some jurisdictions, courts have discarded the familial proximity element, recognizing its arbitrary character. In *Hunsley*, the Supreme Court of Washington commented, "We decline to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress. This usually will be a jury question bearing on the reasonable reaction to the event unless the court can conclude as a matter of law that the reaction was unreasonable." 553 P.2d at 1103. Other courts have concluded similarly. See *Leong*, 520 P.2d 758 ("Neither should the absence of a blood relationship between victim and plaintiff-witness foreclose recovery."); *Paugh*, 451 N.E.2d at 766-67 ("With respect to the third factor, we believe that a strict blood relationship between the accident victim and the plaintiff-bystander is not necessarily required."). Indeed, in the seminal case of *Dillon v. Legg*, the Supreme Court of California warned that the three proximity elements should serve as flexible guidelines, each shading into each other, and that liability would need to be determined on a case-by-case basis. 69 Cal.Rptr. at 80-81, 441 P.2d at 920-21. Considering that Gottshall and Johns had been friends for fifteen years, in these jurisdictions Gottshall's claim would be cognizable and would be presented to the jury.

Even if Gottshall does not satisfy the traditional bystander test, the principle underlying the rule applies in this FELA case. In light of the relationship between FELA and the common law, and the policies governing FELA, the lack of a familial relationship between the plaintiff and the victim does not necessarily remove the indicia of genuineness.

We must provide relief for injuries consistent with the realities of working in the railway industry. The conditions and concepts of industry's duties toward its workers often mirror the development of common law's concept of tort law, which has largely embraced the theory of a claim for emotional harm. We can no more ignore this development than go back to the traditional rules of master and servant. But the reality in the railway industry is that there will hardly be a situation where one sees another family member injured while working in the railroad yard. The common law rule requiring a familial relationship is based on the same principles that bind all rules governing negligent infliction of emotional distress, that is, to separate the wheat from the chaff. The theory, of course, is that when a family member is injured or killed there is real emotional trauma and grief.

Aside from the obvious certainty in the law it produces, the familial proximity element is of little value as a test to determine valid FELA claims. That element is tied to two policy considerations. First, common law courts must set forth generally applicable rules of law that must apply to society as a whole. In *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979), the New Hampshire Supreme Court recognized the bystander cause of action when a mother witnessed her child injured. The dissent articulated the concerns all common law courts share:

> Past experience teaches me that this is not the end. This case may be limited to parent and child, but what about the child-parent case, or that of the husband and wife, brother and sister, grandparent and grandchild, the fiancee or close friend? There is just no way a logical distinction can be drawn and liability to these people will be thrust upon us in years to come. Love and affection is not necessarily confined to parenthood or even blood relationship.

406 A.2d at 308. Thus courts are wary of judicially expanding the bystander cause of action into the "fantastic realm of infinite liability." *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal.2d 295, 315, 29 Cal.Rptr. 33, 379 P.2d 513 (1963), overruled, *Dillon v. Legg*, 69 Cal.Rptr. 72, 441 P.2d 912.

Second, state courts have been wary of the public policy ramifications from recognizing certain relationships for purposes of tort law. For example, in *Elden* the California Supreme Court refused to apply bystander liability for unmarried cohabitants because "the state has a strong interest in the marriage relationship; to the extent unmarried cohabitants are granted the same rights as married persons, the state's interest in promoting marriage is inhibited." 250 Cal.Rptr. at 258, 758 P.2d at 586. One can easily see the public policy quagmire states would be bogged in if they recognize other less traditional relationships for the purposes of common law torts.

The insistence that the victim and plaintiff stand in a familial relationship affixes the cause of action at an arbitrary point on a continuum of relationships and is

inconsistent with FELA policies. Common experience tells us that we do not grieve for only those in our immediate family. It is true we are likely traumatized whenever a family member is killed or severely injured; but the "same would often be true of very close friends." *Id.* By trying to exclude the frauds and opportunists, this common law theory excludes the truly injured as well.

Moreover, the policy concerns that drive the rule do not apply to FELA. There is little chance that federal courts will be enmeshed in state public policy implications by recognizing certain relationships when considering whether the plaintiff and victim railroad coworkers were closely related. In FELA, Congress, rather than the courts, created the cause of action and allocated the economic and social burdens. See Typescript 24-27. In discerning the congressional intent, the Supreme Court has repeatedly said that recovery should be liberally granted under the FELA policies. Recovery will not exponentially expand to the "fantastic realm of infinite liability" and place an intolerable burden upon society because the cause of action is limited to FELA cases.

The relational proximity element is "indisputably arbitrary since it is foreseeable that in some cases unrelated persons have a relationship to the victim or are so affected by the traumatic event that they suffer equivalent emotional distress." *Thing*, 257 Cal.Rptr. at 879, 771 P.2d at 828. In FELA cases, more so than common law negligence actions, we must curtail arbitrary line drawing so that the remedial and humanitarian goals of the statute can be fully implemented. To the extent doctrinal requirements of the common law encroach upon FELA policies and preclude remedies in meritorious cases, the common law must bow. We have full confidence that, with rigorous judicial attention to the facts to assure that the circumstances are sufficiently clear to confirm the genuineness of the claim, the court and the jury, drawing upon their combined human experiences in the course of a trial, will distinguish between victims and fakes and between close relationships and mere acquaintances.

Gottshall was not only a bystander closely related to the victim, but was also an active participant. The factual scenario akin to the one in *Althoff* is sufficient to bring a FELA action. *Outten*, 928 F.2d at 78-79. There, Althoff was operating a crane when the crane released an object that fell and killed the victim. He did not witness the injury nor was he within the zone of danger, but he did see the victim immediately after the accident. The district court concluded "plaintiff was not a passive bystander, but an *active participant* in the events giving rise to the accident: plaintiff was the operator of the device which turned out to be the prime mover of the events which culminated in Mr. Lauver's destruction." (Emphasis added.) Because an emotional injury is reasonably foreseeable in these kinds of circumstances, they provides the necessary assurance to present a jury question. *Id.* at 79.

Here Gottshall was more than a mere witness at the scene. While not a cause, he was an active participant in the events leading to Johns' death. He was among the first to rush to Johns' assistance. He gave mouth-to-mouth resuscitation and CPR to Johns for a full forty minutes. He carried the body of his friend to the ambulance parked two thousand feet away. The sense of loss and helplessness as one's friend dies beneath one's breath and the resulting emotional injury that he would suffer is easily foreseeable. Gottshall recalled, "Watching my close friend die, having him die in my own hands during CPR as a result of the extreme working conditions that Conrail imposed upon us, was unlike anything I had ever experienced." One worker observed, "it really hit him hard. With him knowing CPR and he couldn't bring him back, and I guess Dick was a good friend of his." The next day the same worker observed Gottshall was "[l]ike more or less upset with himself about it." Even Norvick, the Conrail supervisor, acknowledged, "Well, he took it hard like all of us. I mean, Mr. Gottshall was performing CPR on him and giving his breath into Johns. And when you don't revive somebody, you take it personal. I mean, I know I would."

Finally, the *Buell* Court hinted that physical symptoms of severe psychological illness are a factor. 480 U.S. at 569-71 & n. 22, 107 S.Ct. at 1418 & n. 22. The Court there confronted the issue of whether a claim for purely emotional injuries is cognizable. In declining to decide this issue, the Court noted that once the facts are fleshed out the case might not present this issue of pure emotional injury as the plaintiff "claimed to have suffered physical symptoms in addition to his severe psychological illness." *Id.* Indeed it is this issue that has confounded, divided and silenced federal courts. See *Stoklosa*, 864 F.2d at 426 (declining to address the issue); *Adams*, 899 F.2d at 539 (same); *Elliott*, 910 F.2d at 1229 (same); *Robert*, 832 F.2d at 7 (same); *Gaston*, 866 F.2d at 821 (same); *Plaisance*, 966 F.2d at 169 (same). But see *Taylor*, 787 F.2d at 1313 (purely emotional injuries cognizable); *Plaisance*, 937 F.2d at 1009 (same).

This case likewise does *not* involve a claim for purely emotional injuries. At oral argument Gottshall's counsel challenged Conrail to argue that Gottshall's claim was fraudulent. Conrail wisely declined the challenge. Its reticence is understandable considering Gottshall has satisfied the common law's "physical manifestation" test. He lost forty pounds. See *Wilson*, 939 F.2d at 265 (weight loss is physical manifestation of emotional injury). He was institutionalized for three weeks and thereafter received continuing out-patient treatment. See Restatement § 436 A & Comment c (emotional distress may be compensable if accompanied by "bodily harm or other compensable damage"; long continued mental disturbance may be classified as a "physical illness, which is bodily harm"). He was diagnosed by three doctors as suffering from major depression and post-traumatic stress disorder. He had suicidal preoccupations, anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares and a fear of leaving home. See *Towns v. Anderson*, 195 Colo. 517, 579 P.2d 1163, 1164 (1978) (en banc) (nightmares, sleepwalking, nervousness and irritability showed sufficient physical manifestation resulting from emotional distress); *Savard v. Cody Chevrolet, Inc.*, 126 Vt. 405, 234 A.2d 656, 657, 660 (1967) (nervous shock, sleeplessness, loss of appetite resulting in weight loss, faintness and trembling showed sufficient physical manifestation resulting from emotional distress); *Daley v. LaCroix*, 384 Mich. 4, 12-13, 179 N.W.2d 390, 395-96 (1970) (weight loss, inability to perform household duties, extreme nervousness and irritability are facts from which a jury could find a compensable physical injury); *Dobelle v. National R.R. Passenger Corp.*, 628 F.Supp. 1518,

1522, 1526-27 (S.D.N.Y.1986) (hospitalization, subsequent out-patient treatment, major depression, crying spells, weight gain, and sleep disturbances showed sufficient physical symptoms to constitute "bodily harm"); *Johnson*, 372 N.Y.S.2d at 639, 334 N.E.2d at 591 (recurrent nightmare, terrifying dreams of death, difficulty in concentrating, irritability, inability to function at work properly, tenseness and anxiety, as well as psychiatric confirmation of the emotional distress showed objective manifestations of the injury). Gottshall's physical symptoms objectively confirm what he has been alleging and what three doctors diagnosed.[7] These symptoms are then evidence of the degree of mental distress suffered. *Leong*, 55 Haw. at 403, 520 P.2d 758; *Paugh*, 451 N.E.2d at 765; *Versland*, 671 P.2d at 588.

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[7] "Psychiatric/psychological examining techniques have increased markedly in sophistication since the advent of the physical impact, zone of danger and ensuing physical injury rules. As a result, successfully feigning a psychic injury is not an easy matter." Bell, *The Bell Tolls: Towards Full Tort Recovery for Psychic Injury*, 36 U.Fla.L.Rev. 333, 351 (1984) (cited by *Buell*, 488 U.S. at 569-71 n. 20, 107 S.Ct. at 1418 n. 20). "The existence and extent of mental distress is no longer generally viewed as so substantially different from, and easier to feign than, physical injury as to require qualitatively different rules of recovery. This change in perception reflects, in part, an increasing judicial notice and acceptance of the advances in the medical and behavioral sciences." Supra n. 1, Comment, 33 Vill.L.Rev. at 789. "In judging the genuineness of a claim of mental distress, courts and juries may look to 'the quality and genuineness of proof and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out dishonest claims.' " *Rodrigues v. State*, 52 Haw. 156, 172, 472 P.2d 509, 519-20 (1970). Accord *Champion*, 420 So.2d at 350; *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84, 86 & n. 3 (1970); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672, 678-79 (1979); *Battalla v. State*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 37-38, 176 N.E.2d 729, 731-32 (1961); *Towns*, 579 P.2d at 1164; *Versland*, 671 P.2d at 588.

After considering Gottshall's claim under the common law physical manifestation rule, the principles underlying the *Dillon* bystander and *Althoff* active participant rules as adopted in *Outten*, as well as the medical diagnosis of three doctors, we believe that Gottshall has sufficiently shown that his injuries are genuine and severe to create a genuine issue for the jury to decide.

IV.

Satisfied that this claim has passed the threshold burden, we must next consider it in the context of what actually is required for FELA: breach of a duty, injury, and causation.

The concept of negligence in the context of emotional harm claims remains the same as for physical harm. Negligence is conduct that falls below the standard established by law for the protection of others against unreasonable risk. Restatement § 282. It is a failure to do what the reasonable person would do under like circumstances. Id. § 283. It must be commensurate with the known danger and the consequences that might reasonably be anticipated from the negligent conduct. *Urie*, 337 U.S. at 178-80, 69 S.Ct. at 1029. It therefore necessarily involves a foreseeable risk of injury and conduct unreasonable in proportion to the danger. *Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 140, 80 S.Ct. 242, 243, 4 L.Ed.2d 198 (1959). See The Law of Torts, § 43, at 280.

Foreseeability was the focal point in *Outten*. We explained that the *Dillon* bystander rule "reduces the likelihood that fraudulent or trivial claims will be brought and ensures that the resulting injury is sufficiently foreseeable so that it is not unreasonable to hold the defendant responsible." 928 F.2d at 78. Likewise we said the rule in *Althoff* is premised on the same notion, that "it is foreseeable that one who operates an instrumentality that causes another's death would be subject to considerable emotional distress from any guilt that operator might feel." *Id.* at 79. Thus "it is hardly foreseeable," we remarked, "to the railroad that one of its employees might suffer serious psychological injuries as a result of the fear of injury from a train collision over a mile away. There is a 'perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the wrongful act.' " *Id.* (quoting The Law of Torts, § 54, at 361).

In *Holliday* we concluded that Holliday's injuries, "though obviously germane to the assessment of Holliday's condition, have no bearing on the character of Conrail's allegedly tortious activity." 914 F.2d at 425. Our focus on the relationship between the injury and the alleged tortious act suggests that our conclusion there rested on the unforeseeability of emotional injuries attributable to "an ordinary management decision." Thus if an employer is liable for consequences that cannot reasonably be foreseen, even "the most attenuated claims could be advanced." *Id.* In *Holliday* and *Outten* the railways did not breach a duty because the consequences could not be reasonably anticipated from their conduct, which, as we emphasized, did not subject the plaintiffs to physical danger or to witness an injury-causing accident.

This case is not like *Holliday* and *Outten*. Gottshall was subjected to the same physical danger that killed Johns, and he was aware that that force could kill him too. His emotional distress was not attributable to merely the ordinary stress of the job, but was attributable to the extreme stress of witnessing and participating in a fatal accident involving one of his close friends as well as the continuing fear that he would die in the same manner.

The issue is whether Conrail's conduct breached a duty of care. Had Conrail simply worked its men in hot weather, weather falling within the broad spectrum of conditions that constitutes ordinary working conditions, *Holliday* would preclude this claim. *Holliday* stands for the general proposition that employment in the railway industry, like employment elsewhere, entails some risks that all employees must bear and employers should not be the insurers for injuries arising out of working in ordinary conditions of the job. We there refused to extend liability for job stress because "employees in all walks of life are placed in difficult, tense job situations, sometimes for extended periods, so there was nothing unusual here." *Id.* But the conditions Gottshall and his crew experienced were unusual.

Adverse weather conditions may constitute dangerous working conditions and impose upon the employer a duty to exercise a degree of care commensurate with the risks. *Fort Worth & Denver City Ry. Co. v. Smith*, 206 F.2d 667, 669 (5th Cir.1953); *Anderson v. Elgin, Joliet & E. Ry. Co.*, 227 F.2d 91, 95-96 (7th Cir.1955); *Britt v. Terminal R.R. Ass'n*, 311 S.W.2d 130, 134 (Mo.App.1958). Indeed had Conrail sent its men to work on steel rails in the middle of an electrical storm and had an employee been killed by lightning, there would certainly be a jury question as to negligence. See *Childs v. Rayburn*, 169 Ind.App. 147, 346 N.E.2d 655, 660 (1976); *Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193, 196 (6th Cir.1933). See also *Crutchfield v. Bogle*, 270 P.2d 640, 642 (Okla.1954). Here Conrail's conduct goes far beyond simply working men in hot weather. There is a genuine issue of whether Conrail subjected its men to unreasonably dangerous working conditions and whether that conduct was unreasonable in proportion to the risk.

The accident happened during one of the most severe heat waves in recent memory. A Conrail supervisor recalled that he had not experienced such a stretch of hot weather since 1946 or 1948. The extreme heat combined with the humidity made several workers apprehensive. They complained to Conrail supervisors that conditions were too extreme. One worker said, "They guys [sic] were saying it's too hot out here to work. You shouldn't be out here working."

When asked to define "extreme weather conditions," Dr. David C. Deubner, Chief Medical Officer for Conrail at the time of the accident and currently Assistant Vice President of Conrail's Medical Resources Management Department, opined "it is when it's hot, it's humid and the sun is shining." In such extreme weather conditions, he said, Conrail had a widely spread oral practice to vary the work rate with the severity of the weather conditions. Such precautions are necessary because "If people are doing very heavy cardiovascular labor, then it should be slowed down and have longer work breaks, more frequently longer breaks when it gets very hot and humid. . . . that's why when the sun gets too high, you recommend slowing down and having more rest. So your goal in protecting people is to keep the total degree of effort within bounds." He believed these precautions make simple "common sense."

Dr. Deubner also said Conrail had a policy of evaluating an employee's "safe function capacity." Upon such evaluation, Conrail matched an employee's physical health with a physically compatible job function. On March 29, 1988, about four months before the accident, Johns was examined by a Conrail doctor. The medical report indicated Johns was 56 years old, was 5'-1/2" tall and weighed 187 pounds. It also indicated that Johns suffered from high blood pressure, athero or arteriosclerotic cardiovascular disease, and was taking medication. Additionally, Conrail knew most of the men, many overweight, were over 50 years old and some approaching 60 years. It knew that one other worker had previously suffered a serious heart attack. Dr. Deubner suggested that heavy cardiovascular work can interact with a worker's physical conditions so that, depending on those conditions, the overall risk can be enhanced.

He also believed that working in an isolated area poses a greater medical risk because an injured worker "can benefit by timely medical care." The coroner confirmed that had Johns received prompt medical attention his chances of survival "would have significantly increased." Access to communication was therefore crucial.

On the day of the accident, the temperature was hovering at 97 degrees; it was very humid; the sun was shining; the field was in the open; and work started at high noon. Conrail sent middle-aged, overweight men, some with serious cardiovascular health problems, to do very heavy cardiovascular labor at an extremely rapid pace of work. Although Conrail's own medical director recommends work "be slowed down and have longer work breaks, more frequently when it gets very hot and humid," Conrail failed to give the men any scheduled breaks. It concedes on appeal, "They were not entitled to formal breaks, but could drink water when they wished." Conrail Br 8. A Conrail supervisor confirmed, "That's one thing they were allowed to do, get water." The tracks were isolated, but Conrail failed to provide means of communication in case of an emergency.

These circumstances alone would be sufficient to conclude that a reasonable employer should have foreseen the risks and, at minimum, taken one or more of the "common sense" precautions suggested by Conrail's Chief Medical Officer, such as providing communication equipment in case of an emergency, varying hours and pace of the work, incorporating periodic rest breaks and removing those employees who might be particularly susceptible to the conditions.

There is also direct evidence that Conrail actually knew the risk of danger and foresaw the tragedy that was to come. On the day of the accident, several workers complained of the weather conditions and told Norvick it was too hot to be working. Before Johns died, Conrail had frequently discussed implementing a formal policy to address extreme weather conditions such as the conditions experienced by Gottshall's work gang. Conrail had also considered giving its men CPR training. Norvick thought CPR training was a good idea because "all of the fellows were up in age." A training session with the American Red Cross had been set up, but Conrail ultimately canceled it "because of the liability factor."

In *Burns v. Penn Central Co.*, 519 F.2d 512 (2d Cir.1975), unknown assailants had been stoning the railway's cars for months. The railway knew of these attacks but did nothing, and one day an employee was killed by a sniper's rifle shots. The Court of Appeals for the Second Circuit reversed the district court's grant of directed verdict for the railway based on an alleged lack of foreseeability. It concluded, "Based on the railway's actual knowledge of stonings in the vicinity in recent months and its constructive (and indubitably actual) knowledge of the generally dangerous conditions prevailing in the neighborhood in which the fatality transpired, the jury would have acted well within its authority under the FELA by returning a verdict for Mrs. Burns." *Id.* at 514-15. The factual circumstances in *Burns* are similar to this case, and that court's conclusion is correct.

Furthermore, foreseeability of harm and foreseeability of the particular injury resulting are different. In *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), the Court held that a railroad guard could not have reasonably foreseen that his benign action, helping to board a man carrying a small package, could have resulted in an explosion injuring Helen Palsgraf who was standing far away. In another words, the railroad guard could not possibly have foreseen any harm to Palsgraf.

Importantly, *Palsgraf* was not a FELA case. Moreover, we simply have a different case.

In *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963), the worker was bitten on the leg by an insect, which was apparently attracted to a pool of stagnant water the railway left on the worksite. An infection grew and the leg was finally amputated. The railway specifically argued that the *injury* was not reasonably foreseeable. 372 U.S. at 116-18, 83 S.Ct. at 665. The Court disagreed and held that the precipitating event triggering the injury, the insect bite, was reasonably foreseeable. *Id.* 372 U.S. at 118-20, 83 S.Ct. at 666. It then reasoned "that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts." *Id.* 372 U.S. at 120, 83 S.Ct. at 667. See Restatement § 435. Thus, "[t]he test of foreseeability does not require that the negligent person should have been able to foresee the injury in the precise form in which it in fact occurred. Rather it is sufficient if the negligent person might reasonably have foreseen that *an* injury might occur. . . . " *Miller v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 203 F.Supp. 107, 113 (E.D.Tenn.1962) (emphasis in original), affirmed, 317 F.2d 693 (6th Cir.1963).

Like *Gallick*, the precipitating event triggering Gottshall's injury was foreseeable. A genuine issue exists whether Conrail could reasonably have foreseen that its men, including Gottshall, would suffer injuries, emotional or physical, when it subjected middle-aged men, some with health problems, to the stark conditions without scheduled periodic breaks and ready access to communications equipment. If Conrail had a hand in creating the dangerous working conditions that ultimately killed Johns, then under the rationale we enunciated in *Outten* a genuine issue also exists as to whether Conrail could have reasonably foreseen that Gottshall, or any other employee, would then suffer emotional injuries from the tragic events brought about by Conrail's negligence. 928 F.2d at 78-79.

But assuming, arguendo, that Conrail's conduct comported with a reasonable person's leading up to Johns' death, its conduct after the death raises an issue of whether it breached a legal duty. The general duty of care includes a duty to provide a reasonably safe workplace. *Bailey v. Central Vermont R.R., Inc.*, 319 U.S. 350, 352-53, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444 (1943). This duty includes a duty to guard against conditions in the workplace that cause emotional harm to employees. *Buell v. Atchison, Topeka & Santa Fe Ry. Co.*, 771 F.2d 1320, 1323 (9th Cir.1985), affirmed in part and vacated in part, 480 U.S. at 567-71, 107 S.Ct. at 1417-18.

Gottshall alleges that he suffered emotional injuries partly because after the accident he feared he would also die in the same manner. After Johns died, his corpse was laid on the ballast beside the track. With work to be done, Conrail ordered its men back to work to do the very thing that felled Johns. As one Conrail supervisor explained, "After everything was taken care of, they had to go back and finish the railroad, because we had to give the railroad back." During this time Johns' corpse was in full view of the men, including Gottshall. Even after they completed the work, Conrail ordered the men to stay at the worksite, though nothing required them to stay. Gottshall was forced to view the corpse for a full three hours.

The very next day, Conrail did nothing to remedy the extreme physical conditions. The heat wave persisted. Conrail pushed its men even harder and still discouraged them from taking breaks, with water the only source of relief from the severe conditions. They were told, "Don't come in until you are done." Under these conditions the men worked a full shift and three or four hours of overtime, and when they finished, they were told, "Is that all you did today." But for the Grace of God, thought Gottshall, the physical force Conrail subjected its men could have killed him as well.

Ordinary stress of the workplace does not create an unsafe working environment. It and a variety of working conditions comprise the negotiated circumstances of the employees' duties. There is, however, evidence that conditions that day were anything but "ordinary," much less characterized as a "negotiated circumstance." Indeed, they were extreme. Gottshall swore, "Watching my close friend die, having him die in my own hands during CPR as a result of the extreme working conditions that Conrail imposed upon us, was unlike anything I had ever experienced either on the railroad, or otherwise, and it deeply, deeply, disturbed me." Gottshall had worked for Conrail for fourteen years and never had psychological or emotional problems. Another worker swore in an affidavit, "The conditions at the Watsontown Secondary on the date of the accident were substantially more severe than the general working conditions associated with the job. The extreme heat and humidity, and the pace of the work, were unbearable." Another worker swore, "Working on a division gang can be strenuous. However, the situation on the date of Mr. Johns' death, involving extreme heat, no breaks, no shade and being pushed very hard, was something different." Gottshall recalled, "It was 97 degrees. It was hot and humid. They put us out there to change rails, push, push, push. . . . I'm not an animal."

We cannot casually assume work under these extreme conditions to be a "negotiated circumstance." The combination of the conditions created not only physical hazards, but constituted emotional hazards which can equally debilitate and scar an employee, particularly one who had just witnessed a friend die under the same conditions. Additionally, Conrail wholly created the circumstances where Gottshall had to watch his friend's body "bake like a potato" while doing the very thing that killed him under the same hostile conditions.

FELA "is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by the courts, and within the word as ordinarily used." *Jamison*, 281 U.S. at 640, 50 S.Ct. at 442 (citations omitted). In the totality of the terrible circumstances surrounding this case, we are unwilling to say that Conrail was not negligent as a matter of law. "[F]oreseeability of harm is no less a matter generally left to the jury's broad decision than any other part of the requisite proof to recover under the FELA." *Burns*, 519 F.2d at 514. We have no trouble concluding that the facts, as presented to us and in light most favorable to Gottshall, present a genuine issue of material fact whether Conrail breached a general duty of acting with care and a duty to provide a safe workplace.

We likewise have no trouble concluding that a genuine issue exists whether Gottshall sustained cognizable injury as a result of emotional trauma. Gottshall was institutionalized for about three weeks; three doctors diagnosed him as suffering from severe post-traumatic stress syndrome; and he exhibited objective, physical symptoms of his emotional injuries. See supra Typescript 42-43. We also have no trouble concluding that a genuine issue exists as to whether Conrail's negligence "played any part, however small, in the injury or death which is the subject of the suit." *Rogers*, 352 U.S. at 508, 77 S.Ct. at 449. The law of this circuit is that a court may take a case from jury consideration on causation grounds "only in those extremely rare instances where there is zero probability either of employer negligence or that any such negligence contributed to the injury of an employee." *Pehowic v. Erie Lackawanna R.R.*, 430 F.2d 697, 699-700 (3d Cir.1970).

Because a railway employer's duty is high and FELA provides for a most lenient causation inquiry, a court must be cautious in granting summary judgment. "It is well established that the role of the jury is significantly greater in Jones Act and FELA cases than in common law negligence actions. The right of the jury to pass upon the question of fault and causation must be most liberally viewed." *Johannessen v. Gulf Trading & Transp. Co.*, 633 F.2d 653, 656 (2d Cir.1980). See *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 807 (6th Cir.1985); *Eggert v. Norfolk & W. Ry. Co.*, 538 F.2d 509, 511 (2d Cir.1976); *Boeing Co. v. Shipman*, 411 F.2d 365, 370-73 (5th Cir.1969) (en banc); *Pierce*, 823 F.2d at 1370 (9th Cir.) (citing *Ybarra v. Burlington N., Inc.*, 689 F.2d 147, 149 (8th Cir.1982)). "By enacting FELA, Congress desired to 'secure jury determinations in a larger proportion of cases than would be true of ordinary common law actions.' " *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 269 (3d Cir.1991) (quoting *Shipman*, 411 F.2d at 371). Indeed under FELA "trial by jury is part of the remedy." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, 82 S.Ct. 780, 783, 7 L.Ed.2d 798 (1962). Viewing all the facts in the light most favorable to Gottshall, we are confident that his claim has sufficient indicia of genuineness and that Gottshall has satisfied the requisite elements for pleading a FELA action to entitle him to trial on the merits.

V.

In so concluding, we are aware, and emphasize, that even under the liberal recovery policy under FELA, the employer is not the insurer of the worker's safety. As in the common law, there must be some finite limit to the railway's potential liability. See *Thing*, 257 Cal.Rptr. at 878, 771 P.2d at 827 (to delimit liability "policy considerations justify restrictions on recovery for emotional distress notwithstanding the sometimes arbitrary result"); *Elden*, 250 Cal.Rptr. at 258, 758 P.2d at 586 ("social policy must at some point intervene to delimit liability"). The Court of Appeals for the Fifth Circuit explained that one reason behind the common law's restrictive tests is to avoid

> multiplying damages incalculably on the basis of factors which are entirely incidental to the operation of the train or vessel and which bear little or no relationship to the safety of that venture – factors such as how many crew members happen to be standing around to observe an incident, whether their vision is obscured by darkness or weather, how close they are to the occurrence and the like.

Gaston, 866 F.2d at 820. Even when a worker's injuries are real and demonstrable, the *Gaston* court believed that exposing employers to such potentially ruinous liability "involves evaluating economic trade-offs which we (or any other court) are poorly equipped even to envision, let alone to weigh against each other." *Id.*

We agree insofar as strong policy reasons preclude finding liability for "every possible distressful happening to which a railroad worker is exposed." *Outten*, 928 F.2d at 79. See *Holliday*, 914 F.2d at 425. This policy simply echoes the belief that frivolous claims for trivial emotional disturbances and bruised feelings that are ordinary and expected as a part of daily life, such as stress from the ordinary conditions of the workplace, are not cognizable. To this end, the proper limits on liability are those fixed by generally applicable principles of tort law. Recognizing the reality that every act or omission can affect the procession of human events, the law through the years has considered the proper balance between remedying the injured individual and exposing every member of society to the myriad of possible consequences of living in a complex world. In the case of physical injuries, the law has dealt with this problem through concepts such as duty, foreseeability, and proximate cause. Given that the employer owes a duty to provide a safe workplace, once the employer breaches that duty through an act or omission creating a foreseeable risk, that fortuity determines the number of persons actually injured or the extent of those injuries does not prevent recovery.

A simple example will serve. Imagine that the employer negligently caused a railroad accident in which fifty workers were killed or injured. That the employer's liability depends, to some extent, on factors that it had no way of controlling is irrelevant for the purpose of imposing liability. True, the aggregate liability on the negligent employer in this case would be severe. But where the risk was reasonably foreseeable, where the danger was disproportionate to that risk, and "where the concern is to avoid imposing excessive punishment upon a negligent defendant, it must be asked whether fairness will permit leaving the burden of loss instead upon the innocent victim." The Law of Torts, § 54 at 361. When a claim for emotional injuries shows a sufficient indicia of genuineness so as to create a factual dispute, the same tort principles apply to the employer's liability.

The federal courts bear the duty of determining this liability and fashioning remedies. By placing the onus of performing this task on the federal courts, Congress has dictated that we evaluate the economic trade-offs and properly balance the competing policies. Congress has, however, given us some guidance in how to strike this balance. It has provided that recovery be liberally granted and that the railway industry, as a single economically sufficient enterprise, bear the social and economic burdens of workers who give their labor to further the common endeavor and who have suffered as a result of their employers' negligence. Congress promulgated FELA to promote "the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden." *Sinkler*, 356 U.S. at 330, 78 S.Ct. at 762 (quoting Sen.Rep. No. 460, 60th Cong., 1st Sess. 3). See supra 25-27. Where the burden becomes heavy on a railway, it is only because in seeking to achieve the ends of the enterprise the railway has placed an equally heavy burden on its workers, a burden paid in lost lives, limbs, and livelihoods. When an employer breaches a duty of care to provide a safe workplace, it is liable under FELA if an employee suffers an injury, physical or emotional, causally related to its negligence.

We are also aware of the *Kraus* court's admonitions about incalculable and potentially unlimited damages, floods of litigation, and fraud. See *Holliday*, 914 F.2d at 424; The Law of Torts, § 54, at 360-61; Restatement § 436A comment b. But we must also be aware that these concerns cannot become the incantations by which railway attorneys make all plaintiff's claims disappear. Dean Prosser has observed:

> The same objections against allowing recovery have been advanced here as well: that mental disturbance cannot be measured in terms of money, and so cannot serve in itself as a basis for the action; . . . that there is a lack of precedent, and that a vast increase in litigation would follow. All these objections have been answered many times, and it is threshing old straw to deal with them. Mental suffering is no more difficult to estimate in financial terms, and no less a real injury, than "physical" pain; it is not an independent intervening cause, but a thing brought

> about by the defendant's negligence itself, and its consequences may follow in unbroken sequence from that negligence; and while it may be true that its consequences are seldom very serious unless there is some predisposing physical condition, the law is not for the protection of the physically sound alone. It is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied; and there has long been precedent enough, and no great increase in litigation has been observed.

The Law of Torts, § 54, at 360. See *Corso*, 406 A.2d at 306 (where rule allows for more liberal recovery "the adoption of well-defined foreseeability factors will not lead to unlimited liability, and that the threat of remote and unexpected liability is not a substantial fear") (cited by *Buell*, 480 U.S. at 569-71 n. 21, 107 S.Ct. at 1418 n. 21); *Ramirez v. Armstrong*, 100 N.M. 538, 542, 673 P.2d 822, 826 (1983) (same); *Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 133, 447 N.E.2d 109, 111 (1983) (expressing doubts that problem of increasing litigation is real, and if real, would be unacceptable reason for denying recovery in meritorious cases); *Toms*, 207 N.W.2d at 145 (rejecting the "opening the flood gates of litigation" argument as meritless).[8]

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[8] Indeed, as medical science continued to make strides and as the initial fear of inability to objectively and definitively verify these claims began to subside, the common law trend shows a greater receptivity towards these claims. Pennsylvania serves as an example.

Before 1970, Pennsylvania acknowledged only the physical impact rule of liability. See for example, *Knaub v. Gotwalt*, 422 Pa. 267, 270, 220 A.2d 646, 647 (1966). The cases applied this rule

Our research confirms the observation that litigation has not increased by allowing claims for emotional

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with "obstinate rigidity in that recovery was denied not only when the complaining party was a nearby witness, but also to the actual victim of the tortfeasor's negligence or frightening conduct." *Sinn*, 404 A.2d at 675 (citing *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958)).

But in 1970, the Pennsylvania Supreme Court abandoned the physical impact test and adopted the more flexible zone of danger test, believing it was compelled by the "inherent humanitarianism of our judicial process." *Niederman*, 261 A.2d at 85. In so doing, it rejected the arguments that damages are incalculable, that the possibility of recovery in such claims will encourage fraud and frivolity, and that courts will be deluged with an avalanche of cases. *Id.* at 86-89.

With experience, the Pennsylvania courts realized that even the zone of danger test can be too restrictive and arbitrary. In 1979, the Pennsylvania Supreme Court remedied the situation by adopting the bystander rule of liability, believing that the deficiencies in the zone of danger test are "glaringly apparent." *Sinn*, 404 A.2d at 686. In so doing, it again rejected the argument that such a rule will lead to incalculable damages, fraud and frivolity, and a flood of litigation. *Id.* at 678-85. The court concluded, "It is clear that appellant's injuries were of a nature reasonably foreseeable under the circumstances alleged." *Id.* at 686. Thus a review of Pennsylvania law shows that Pennsylvania has reversed course, from applying almost case-barring restrictions on these types of claims towards applying generally applicable principles of tort law.

Other jurisdictions have followed similar trends. See for example, *Champion*, 420 So.2d at 352 ("Thus, we believe traditional principles of negligence analysis may be applied in such cases and the imposition of undue liability may be avoided by using the broader test of reasonable foreseeability."); *Leong*, 55 Haw. at 403, 520 P.2d 758 ("A survey of cases from other jurisdictions does not show the development of a logical and consistent rule, but reveals that the trend is a hesitant abandonment of such artificial restrictions and barriers to recovery in favor of a distress. In the over five years since the *Buell* Court "opened the door," the courts of appeals reported seventeen cases involving a claim for emotional distress. See supra Typescript pp. 13-19. This appeal makes eighteen. This number in a span of five years can hardly be called a "flood" of litigation. If there was ever a time when we expected the flood of litigation, it was when the door was first opened. The apocalypse argued by the railway has not come to pass.

In *Buell* the railway contended that if emotional injuries are cognizable under FELA, virtually no employees will pursue grievances through the RLA since "every employee who believes he has a legitimate grievance will doubtless have some emotional anguish." 480 U.S. at 567 n. 13, 107 S.Ct. at 1416 n. 13 (quoting from the brief for the railway). One amicus asserted that a large portion of the 183,800 grievances filed in 1985 would be pursued as FELA actions instead, thus creating the "potential for doubling the volume of civil filings in the federal courts." *Id.* (quoting from amicus brief).

The Supreme Court unanimously and summarily rejected this "parade of horribles," exposing the strained assumption on which the railway relies, that is, that a significant percentage of employees bringing grievances suffer the type of genuine and severe emotional injury that has generally been required to establish liability for purely emotional injury. *Id.* See *Moody*, 823 F.2d at 694 (recognizing Buell substantially rejected the "flood of litigation" argument).

The concerns articulated in *Kraus* must be balanced with the notion that "a flood of litigation" and fraudulent claims may serve judicial prudence, but it can never serve judicial convenience. "Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction. 'The argument from mere expediency cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy in *all* cases because in *some* a fictitious injury may be urged as a real one.' " *Battalla*, 219 N.Y.S.2d at 37, 176 N.E.2d at 731 (emphasis in original) (quoting *Green v. T.A. Shoemaker & Co.*, 111 Md. 69, 81, 73 A. 688, 692 (1909)).

VI.

Before we conclude, it is important that we spell out what we are not holding. We are not holding that a railroad breaches a duty of care when it works its men in hot weather. We are not holding that an employer must refrain from pushing its men to do hard labor. We are not holding that every employee who suffers emotional injuries as a result of the railway employer's conduct has a valid FELA claim. We are not holding that every bystander to an accident has a valid FELA claim. We are not even holding that every bystander who sees a close friend injured or killed has a valid FELA claim.

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greater reliance on general tort law principles and the contemporary sophistication of the medical profession to test the veracity of claims for relief."); *Hunsley*, 553 P.2d at 1102 ("Rather than add to the already existing confusion with the formulation of a new rule, we conclude that the wisest approach is to return to the traditional principles, theories, and standards of tort law.").

We simply hold that considering the totality of these extreme facts in the light most favorable to Gottshall – that is, seeing and actively participating in the events surrounding the death of a friend of fifteen years as a result of Conrail's actions, which includes working men under extreme conditions without taking the precautions arguably required, being forced to stay at the worksite by Conrail for several hours, being forced to be subjected to the same physical force after the accident without the benefits of the precautions arguably required, checking into a mental hospital for three weeks, losing forty pounds, exhibiting other physical manifestations of severe emotional injury, being diagnosed by three doctors as suffering from severe post-traumatic stress syndrome – Gottshall's claim has sufficient indicia of genuineness and he presents genuine issues of whether there is a breach of a duty, injury and causation. He is entitled under FELA to a trial on the merits. We will reverse and remand.

ROTH, Circuit Judge, concurring and dissenting.

I agree with the majority's holding in Parts II A and B that under certain conditions claims for negligent infliction of emotional distress are cognizable under FELA. However, I must respectfully dissent from the majority's determination that the plaintiff here has a valid claim against Conrail for such an injury. In order to describe the reasons for which I come to this conclusion, I first look back to another rail line, the Long Island Railroad Company, and the unfortunate injury which occurred to Helen Palsgraf as she waited in the station for the train to Rockaway beach.

> Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact, it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (N.Y.1928).

To illustrate why I equate the present case with *Palsgraf*, I will begin with an account of the events surrounding the death of Richard Johns as he worked on the Conrail tracks in August 1988. In reviewing these events, we must keep in mind that it is not the family of Richard Johns who seek legal redress in this action. It is Johns' friend, James Gottshall, who makes the claim, based on his reaction to Johns' death. Analyzing this case in respect to *Palsgraf*, I see James Gottshall in the place of

Helen Palsgraf and Richard Johns in the place of the man who carried the package of fireworks.

It is not easy to ignore pain and suffering when considering whether a plaintiff can assert a cognizable legal claim to recover for injury. However, lying beneath the distress invoked by the factual account of Richard Johns' death is the structure of the applicable legal precedents. The question of the propriety of legal recovery for an injury may sometimes be better explored if that factual account is made concisely.

Even though his description of the events leading up to Helen Palsgraf's injury is sparing, Justice Cardozo sets forth the facts necessary to ascertain the scope of liability. Cardozo found no liability on the part of the Long Island Railroad to Mrs. Palsgraf because "[t]he conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away." *Id.* In effect, Cardozo found that the Long Island Railroad had no duty to protect Mrs. Palsgraf from the harm caused by the exploding fireworks because it was not reasonably foreseeable that such an injury would occur. For this reason, Cardozo concluded, the railroad had no duty to prevent or avert the injury to Helen Palsgraf.

Similarly in the case before us, I find no liability on the part of Conrail to James Gottshall because any duty Conrail may have violated would have been a duty to Richard Johns; the impact on James Gottshall of any negligence on the part of Conrail could not have been reasonably foreseeable to Conrail.

Concisely, these are the facts of this case: On an exceedingly hot day in August 1988, a Conrail work gang of nine men, including James Gottshall and Richard Johns, was replacing defective track along a remote stretch of rail line. Gottshall and Johns were friends. About two and a half hours after the gang began working, Richard Johns collapsed. Michael Norvick, the gang supervisor, was unable to radio for assistance because, without notifying the work gang, Conrail had taken the communications base station off the air for repairs. Norvick then drove out from the work site and placed an emergency call for assistance. During this interval, Gottshall attempted cardiopulmonary resuscitation on Johns. His efforts were in vain. By the time the paramedics arrived, Richard Johns had died. The paramedics instructed Norvick to leave Johns' body where it was until the coroner arrived. The body was covered, and Norvick ordered the men to resume work. After the coroner arrived and conducted his investigation, he reported that Johns had died from a heart attack, precipitated by the excessive heat and humidity, combined with the heavy physical exertion. The coroner also stated that Johns' chances of survival would have been significantly enhanced if he had received more prompt medical attention.

After Johns' death, Gottshall returned to work for several days under the same weather conditions. He then told his supervisor that he couldn't take it anymore, the heat and exhaustion. He returned home and secluded himself in his basement. He subsequently spent three weeks in a psychiatric institute. After his discharge, he continued to receive outpatient psychological therapy.

Gottshall brought suit under FELA, alleging that Conrail's negligence created the circumstances under which he was forced to watch and participate in the events surrounding the death of his friend. However, in reviewing Gottshall's claim, it is difficult to determine exactly what he contends was negligent conduct on the part of Conrail. In his brief, Gottshall describes the negligent acts which he alleges converged to cause his injury. These are comprised of Conrail's: 1) pushing Gottshall and the other members in his crew relentlessly in the midst of a scorching heat wave; 2) failing to provide adequate scheduled workbreaks; 3) discouraging unscheduled workbreaks; 4) canceling a planned course on cardiopulmonary resuscitation; 5) scheduling the men to work under these conditions in remote job locations; and 6) knocking out the radio relay that provided Gottshall and his co-workers with their only access to emergency communications. Brief of Plaintiff-Appellant James Gottshall, p. 35.[1]

Gottshall's counsel was questioned at oral argument about the negligent nature of these acts. In response, he spoke of the combination and convergence of events which created the negligence and caused Gottshall's

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[1] Elsewhere in his brief, Gottshall notes other incidents, such as Norvick driving out to call for help without taking Johns with him and Norvick covering the body and leaving it in place until the coroner arrived in accordance with the instructions of the paramedics. These instances are not cited as negligent acts in the brief but apparently as exacerbations. Since I cannot conclude that these examples violated any duty on Conrail's part, I do not include them in the cited list of negligent acts, taken from Gottshall's brief.

injury. However, if we examine these claims individually, these allegations consist for the most part of the negotiated circumstances of the duties of this work crew. Moreover, Gottshall is not prepared to designate particular ones of these allegations as negligent acts in and of themselves. He is not arguing that his working conditions were negligently established by Conrail and the union. Indeed, such a claim would not succeed. This court held in *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 424 (3d Cir.1990) that we will not upset the working rules and working conditions of rail workers' jobs, as structured by management and as monitored by the union. To do so would upset the delicate balance of the collective bargaining agreement absent a more compelling reason. *Id.*

However, to escape our holding in *Holliday*, Gottshall contends that it is more than the individual factors of the working conditions which comprise Conrail's negligence; it is the combination of occurrences which created the negligence on Conrail's part:

> Importantly, Gottshall does not assert that defendant was negligent simply because it required Gottshall's crew to work hard in hot weather, or because defendant had cancelled its CPR course, or merely because of any of the other individual aspects of defendant's negligence. Gottshall claims that defendant's negligence lay in its allowing all of these condiditons [sic] to converge at once; that is why this case is atypical and does not involve a worker's disatisfaction [sic] with general working conditions.

Brief of Plaintiff-Appellant James E. Gottshall, p. 35, n. 14.

Plaintiff has acknowledged that Conrail was not negligent on the sole basis that it sent out the work gang that day or that it sent out the particular men who made up the gang. As to the conditions at the work site, water, shade, and the opportunity to take individual breaks were available there. Moreover, railroad workers inevitably have to work on the rail lines in remote places. This factor is a part of regular working conditions. In regard to cardiopulmonary resuscitation, Conrail made a conscious decision not to provide such training to its workers because of potential liability problems. Plaintiff has not demonstrated that that decision was erroneous or negligently made. In other words, outside of the interruption of the communications link, the allegedly negligent conditions created by Conrail at the time of Johns' collapse consisted in fact of the members of the work gang performing the negotiated duties of their jobs under conditions which may indeed have been difficult but which had occurred in the past and will probably occur again in the future.

From this analysis of Gottshall's claims, I arrive at the determination that the only act that plaintiff specifies as being negligent in and of itself is Conrail's taking the base station off the air for repairs without providing alternate means of communication to the work gang. While Conrail might reasonably foresee that this break in communications could prevent a call to obtain critical medical attention for a sick or injured worker, I cannot conclude that Conrail should be expected reasonably to foresee James Gottshall's reaction to the death of Richard Johns. Nor can I conclude that Conrail reasonably could foresee how the conditions of the work gang's negotiated

work duties and work environment, conditions which individually under our holding in *Holliday* would not support FELA recovery, would converge and, all together, create liability. If none of the parts alone were negligently established, it cannot be foreseeable to a reasonable employer that those parts, or any one or more of them, could combine to create liability through newly combined circumstances.

It is because of this lack of foreseeability that I cannot agree with the majority's conclusion that James Gottshall's claim falls within the contours of liability for negligent infliction of emotional distress. Under the precedents of this court, reasonable foreseeability is required to establish liability under FELA. In *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir.1990), we affirmed the entry of summary judgment in defendant's favor on the basis that the case involved nothing more than a situation in which the stresses of the job over a very short period were too much for plaintiff. *Id.* at 425. In other words, it was not foreseeable in a short period of time that these stresses might be injurious to Robert Holliday.[2] Similarly, in *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir.1991), we specifically held that plaintiff could not recover because his emotional reaction to an accident which occurred at a distance from him was not reasonably foreseeable.

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[2] We noted in *Holliday* that we were not being "called upon to decide whether an employee exposed to dangerous conditions for a protracted time, though not in an accident, could recover." *Id.* at 427. That case has not yet been decided by this court. However, when it arrives, foreseeability under those circumstances might not be an obstacle to recovery.

> [I]t is hardly foreseeable to the railroad that one of its employees might suffer serious psychological injuries as a result of the fear of injury from a train collision over a mile away. There is a "perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' act."[3]

Id. at 79 (quoting *Prosser and Keeton on Torts* 361 (5th ed. 1984)). *Accord Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425 (6th Cir.1988) (plaintiff's extreme reaction to his demotion could not reasonably have been foreseen by the railroad).

In my opinion Conrail could not reasonably have foreseen that its negligence in interrupting the work gang's communication link might cause James Gottshall's severe emotional reaction to the death of Richard Johns, nor could Conrail reasonably have foreseen that individual conditions of work performance, which in themselves were not negligently instituted, might converge to create overall a situation of negligence on the part of Conrail. For these reasons, I conclude that this case does not fall within the contours of liability for negligent infliction of emotional distress as those contours have been drawn by this court. Therefore, I would affirm the district court's granting of summary judgment.

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[3] While the "remoteness" in *Outten* was physical, I find an similar "remoteness" in the present case in the relationship between the break in the communications link and the later ensuing reaction of James Gottshall to the death of Richard Johns. Remoteness is a concept that can be equally well characterized in distance, time, or ultimate consequences.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1263

ALAN CARLISLE,

Appellee,

v.

CONSOLIDATED RAIL CORPORATION,

Appellant.

Appeal From The United States
District Court For The
Eastern District Of Pennsylvania
(D.C. Civil Action No. 88-8752)

Argued: September 21, 1992
Before: MANSMANN and ROTH, *Circuit Judges,*
and RESTANI, Judge, *U.S. Court of International Trade.*[1]
(Filed: March 29, 1993)

OPINION OF THE COURT

ROTH, Circuit Judge:

Alan Carlisle, a former railroad worker, sued his employer under the Federal Employers' Liability Act

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[1] Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

(FELA) for negligent infliction of emotional distress. Carlisle alleged that his employer, Consolidated Rail Corporation ("Conrail"), breached its duty to provide a safe workplace by requiring him to work under unreasonably stressful and dangerous conditions, which resulted in foreseeable injuries to his health. At trial, the jury returned a verdict in favor of Carlisle, awarding him $386,500 in damages. Conrail moved for judgment n.o.v., alleging that the facts submitted to the jury were legally insufficient to support the verdict, and moved, in the alternative, for a new trial based on alleged trial errors. Conrail now appeals from an order of the district court, 790 F.Supp. 521, denying Conrail's post-trial motions. For the reasons discussed below, we will affirm.

I.

Alan Carlisle started working on the railroad in 1973 as a ticket agent for the Reading Railroad, rising rapidly to positions as a tower man, a block operator, and finally a train dispatcher. Carlisle worked for Conrail from its formation in 1976 until 1988, first as a train dispatcher and later as a supervisor of all rail operations in the Philadelphia area. Train dispatchers and their supervisors are responsible for the safe movement of trains carrying passengers, freight and hazardous materials.

Beginning in 1984, Conrail sharply reduced its workforce, which, in combination with the risks presented by the company's aging railstock and outdated switching equipment, increased the stress and responsibility of dispatchers' and supervisors' jobs. As a dispatcher, Carlisle

was under constant pressure to achieve on-time performance for the trains. Carlisle testified at trial that he was made increasingly anxious by Conrail's repeated instructions to ignore safety concerns, such as malfunctioning equipment or poor maintenance, that would have slowed the movement of trains.

In 1988, Carlisle was moved to a trainmaster position in the South Philadelphia yards, which required him to work long and erratic hours as a troubleshooter, often in dangerous areas. Despite the new job assignment, Carlisle also continued to work occasionally as a supervisor and dispatcher, retaining many of the job responsibilities of his earlier position. Conrail had cut the number of people staffing each shift from eleven to four, requiring most employees in Conrail's dispatching office to double up on responsibilities. Carlisle testified at trial that, as a result of being overworked and burdened with both excessive responsibility and an abusive, alcoholic supervisor in the South Philadelphia yards, he experienced insomnia, fatigue, headaches, depression, sleepwalking and substantial weight-loss. Carlisle testified further that, as a result of being made to work 12 to 15 hour shifts for 15 consecutive days in August, 1988, his stress-related problems finally culminated in a nervous breakdown. At trial, Carlisle put on testimony by an expert on emotional stress who stated that Carlisle had suffered a bout of major depression and was disabled from returning to his job as a train dispatcher. Carlisle never returned to work for Conrail, choosing instead to pursue new careers first as a real estate agent and then as a secondary-school teacher.

Carlisle introduced evidence showing that his emotional and physical injuries were a foreseeable result of his working conditions. Over defendant's objection, the court admitted into evidence a series of depositions, taken in a separate case,[2] in which Carlisle's co-workers and subordinates testified that their jobs as dispatchers and supervisors in the Philadelphia Conrail offices had caused them to suffer cardiac arrests, nervous breakdowns, and a variety of emotional problems such as depression, paranoia and insomnia. Carlisle testified that the train dispatchers he supervised often complained about Conrail's outdated equipment and about the long hours and high level of stress in their jobs; Carlisle, in turn, passed on their complaints to his supervisors and added his own concerns about the excessive hours and stress of his job. He received no response to these complaints.

The trial court also admitted into evidence two reports from the Federal Railway Administration, one that documented the stressful nature of a train dispatcher's job and one that criticized the outdated equipment and hazardous working conditions at Conrail's Philadelphia dispatching office.

II.

Carlisle brought this action in federal district court under the FELA, 45 U.S.C. §§ 51-60 (1988). This appeal is

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[2] *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073 (E.D.Pa.1989), *appeal dismissed*, 899 F.2d 1360 (3d Cir.1990).

taken from a final order of the district court and thus this Court's jurisdiction rests on 28 U.S.C. § 1291 (1988).

Conrail appeals the denial of its motion for a judgment notwithstanding the verdict on the grounds that Carlisle presented facts that were legally insufficient to support recovery under the FELA for injuries resulting from negligent infliction of emotional distress. Conrail also appeals the denial of its motion for a new trial, alleging a variety of trial errors. We will first consider the district court's interpretation and application of the law regarding the FELA and then consider Conrail's allegations of trial error.[3]

Our review of the district court's interpretation and application of legal precedent governing FELA liability for emotional injury is plenary. *Dent v. Cunningham*, 786 F.2d 173, 175 (3d Cir.1986). Our review of findings of fact by the district court follows a clearly erroneous standard. *Leeper v. United States*, 756 F.2d 300, 308 (3d Cir.1985). Our review of the district court's rulings on the relevance and admissibility of evidence follows an abuse of discretion standard. *United States v. Driggs*, 823 F.2d 52, 54 (3d Cir.1987).

Conrail claims that this Court's precedent does not allow recovery for job stress-related injuries absent a precipitating accident causing injury or fright. At the time of trial, this Court had never upheld a claim under the FELA for injuries absent these factors. Yet, such cases explicitly were decided on a case-by-case, fact-specific basis and held open the possibility of recovery. Indeed, since Carlisle's trial we have expanded the basis for recovery under the FELA. In *Gottshall v. Consolidated Rail Corp.*, No. 91- 1926, ___ F.2d ___ (3d Cir. Feb. 8, 1993), we upheld a claim for negligent infliction of emotional distress under the FELA, but under factual conditions quite different from this case. On the facts of this case, we will affirm for the first time the grant of damages under the FELA for negligent infliction of emotional distress for work stress-related injuries. This holding rests on evidence admitted at trial which reasonably supports a finding by the jury that Conrail breached its well-established duty under the FELA to provide a safe workplace, that such injuries were the foreseeable result of Conrail's negligence, and that Carlisle's demanding and dangerous workplace caused his emotional and physical injuries.

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[3] We find to be without merit and consequently will not discuss Conrail's allegations of error by the trial court in its failure to instruct the jury on the proper legal standards of FELA jurisprudence, its failure to instruct on contributory negligence, and its failure to grant a new trial because of prejudicial remarks made by plaintiff's counsel.

A. Current FELA Jurisprudence

Congress enacted the FELA in 1908 to provide compensation for railway employees suffering job-related injuries caused by the negligence of their employer. The FELA, as codified, provides that every railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . resulting in whole or in part from the negligence of [the railroad]." 45 U.S.C. § 51. As stated by the Supreme Court: "We have recognized generally that the FELA is a broad remedial statute, and have adopted a 'standard of liberal construction in order to accomplish [Congress'] objectives.' " *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562, 107 S.Ct. 1410, 1414, 94 L.Ed.2d 563 (1987) (citation omitted). Thus, an employee can recover under the FELA as long as the employer's negligence "played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957); *Pehowic v. Erie Lackawanna R.R. Co.*, 430 F.2d 697, 699 (3d Cir.1970) (quoting *Rogers*). The FELA imposes on railroads a clear duty to provide their employees with a safe workplace. *Sano v. Pennsylvania R.R. Co.*, 282 F.2d 936, 937 (3d Cir.1960).

In deciding which injuries are compensable under the statute, FELA jurisprudence "gleans guidance from common-law developments." *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417. However, determining the scope of FELA liability is distinctly "a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws. . . . " *Urie v. Thompson*, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282 (1949). While the tort of negligent infliction of emotional distress was unknown in 1908, mental distress law has evolved to the point where all states have recognized the tort, but with a wide array of threshold tests and limitations. An American Law Reports annotation noted many years ago that "[t]he case law in the field [of emotional distress] is in an almost unparalleled state of confusion and any attempt at a consistent exegesis of the authorities is likely to break down in embarrassed complexity."[4] This wide divergence among states in their doctrinal approach to recovery for emotional injury continues to this day.[5]

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[4] Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2d 100, 103 (1959) (footnotes omitted).

In *Buell*, the Supreme Court declined to decide whether wholly emotional injuries arising from work conditions were compensable under the FELA, partly because of the inadequacy of the record in that case, but also because of the broad divergence among the states in their standards for recovery for negligent infliction of emotional distress. The *Buell* Court noted the striking doctrinal divergences between states in the area and concluded:

> [T]he question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of the law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

Id. 480 U.S. at 570, 107 S.Ct. at 1418. Following the Supreme Court's ruling in *Buell*, the federal courts of appeals have engaged in case-by-case determinations of the proper standards for recovery under the FELA in cases involving claims for negligent infliction of emotional distress.

Four basic common law standards have been adopted by the states for testing the genuineness of claims arising

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[5] *See* Douglas Marlowe, Comment, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 **Vill. L. Rev.** 781 (1988).

from negligently inflicted emotional injuries: the "physical impact" test (recovery only where plaintiff's emotional injury is incidental to physical contact); the "zone of danger" test (recovery absent contact allowed when emotional injury arises from plaintiff being threatened with physical harm); the "physical manifestation" test (plaintiff's emotional injury must cause some physical injury); and the "relative bystander" test (plaintiff must witness injury to a close relative).[6]

These doctrines have been adopted due to the courts' suspicion that emotional distress claims are often subject to fraud and exaggeration. See Restatement (Second) of Torts § 436A cmt. b (1965) (detailing concerns that emotional injury claims are often trivial, falsified and unforeseeable). The central purpose of the four standards is to screen possibly fraudulent claims for emotional injury by requiring some external indicia of the genuineness of the harm suffered. This Court has repeatedly noted its concerns about the potential for a flood of litigation, unlimited damages and fraud arising from unrestrained emotional distress claims. *See, e.g., Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 79 (3d Cir.1991); *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 424 (3d Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 970, 112 L.Ed.2d 1057 (1991).

However, an important tension exists between courts' concerns about excessive, frivolous litigation, the common law standards employed by the courts to curb such claims, and the broad remedial purposes of the FELA. As noted by the *Buell* Court, "[a] primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." 480 U.S. at 561, 107 S.Ct. at 1413. The Supreme Court has also held that "Congress did not intend to create a static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty towards its workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 398, 2 L.Ed.2d 382 (1958). Thus, Congress' express intent in creating the FELA and the Supreme Court's consistent interpretation of the statute require us to reconcile the FELA's mandate to expand recovery standards with the courts' reasonable concerns about the potential for a flood of baseless litigation.

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[6] *See generally* Peter Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 **U. Fla. L. Rev.** 333 (1984); Marlowe, Comment, 33 **Vill. L. Rev.** 781 (1988).

In our recent opinion in *Gottshall*, we reviewed closely the recent decisions of the other circuits since *Buell*. ___ F.2d at ___, ___. Rather than repeating that effort here, we will note that only the Seventh Circuit has firmly decided this issue since *Buell*, reaffirming its earlier holding that purely emotional injuries are not compensable under the FELA, while the Ninth Circuit continues to operate under a pre-*Buell* holding allowing full recovery under the FELA for emotional injuries. *See Ray v. Consolidated Rail Corp.*, 938 F.2d 704 (7th Cir.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 914, 116 L.Ed.2d 813 (1992); *Taylor v. Burlington N.R.R.*, 787 F.2d 1309, 1313 (9th Cir.1986); *Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1372 n. 2 (9th Cir.1987). The First, Fourth, Fifth and Sixth

circuits have declined to decide whether emotional injuries without a precipitating injury or accident are compensable under the FELA, ruling in each case that the plaintiff failed to make a requisite threshold showing. *See Moody v. Maine Cent. R.R.*, 823 F.2d 693 (1st Cir.1987); *Elliott v. Norfolk & Western Ry.*, 910 F.2d 1224 (4th Cir.1990); *Plaisance v. Texaco*, 966 F.2d 166 (5th Cir.1992) (en banc)[7]; *Adams v. CSX Transp., Inc.*, 899 F.2d 536 (6th Cir.1990). Thus, as we concluded in *Gottshall*, a "review of the decisions in other circuits in the wake of *Buell* indicates that there is no common discernable principle, test, view or attitude." ___ F.2d at ___, ___.

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[7] The district court in the present case explicitly adopted the "full recovery" rule as formulated by the Fifth Circuit in *Plaisance v. Texaco*, 937 F.2d 1004 (5th Cir.1991), allowing recovery under the FELA for negligently inflicted emotional distress where the normal showings of duty, breach, causation and foreseeability are met. However, following a recent en banc rehearing, the Fifth Circuit held that the facts of *Plaisance* "make it unnecessary for us to decide whether the Jones Act [and FELA, its underlying statute] permit[ ] recovery for purely emotional injuries." *Plaisance v. Texaco*, 966 F.2d 166, 167 (5th Cir.1992) (en banc). The en banc opinion emphasized that the Fifth Circuit's earlier holding in *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir.1989) "continues to represent the law of this circuit." *Id.* at 169. *Gaston* rejected recovery under the bystander test, which "implicitly foreclosed recovery under any less exacting model, such as a full recovery theory." *Id.* Thus, the revised *Plaisance* opinion strongly suggests that the Fifth Circuit will join the Seventh in rejecting FELA recovery for emotional injuries without actual or threatened physical impact.

B. Third Circuit FELA Precedent

In two recent cases, this circuit has also declined to decide definitively whether the FELA permits recovery for injuries without physical contact or fear of contact, deciding such cases instead on a fact-specific basis. See *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 970, 112 L.Ed.2d 1057 (1991); *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir.1991). However, in our most recent case in this field, *Gottshall v. Consolidated Rail Corp.*, ___ F.2d ___ (3d Cir.1993), this Court for the first time upheld recovery under the FELA for negligent infliction of emotional distress without proof of any physical impact, under circumstances where the emotional distress was accompanied by physical manifestations. Moreover, because the district courts of this circuit have rendered conflicting opinions on this topic, we see a heightened need for clear direction from this circuit and, ultimately, the Supreme Court.[8]

Appellant claims that in order to sustain a cause of action under the FELA for negligent infliction of emotional distress, plaintiff "was required to prove that there was an accident, physical impact or injury to someone. . . . [A]n employee, like Carlisle, who allegedly suffers from stress-related injuries or illnesses caused by his general working conditions, fails to state a claim

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[8] Given the conflicts among the circuits, Justices White and Thomas have stated their belief that "a uniform rule should be announced by th[e Supreme] Court on this important and recurring issue." *Ray v. Consolidated Rail Corp.*, ___ U.S. ___, 112 S.Ct. 914, 116 L.Ed.2d 813 (1992).

under the F.E.L.A." Appellant's Brief at 11-12. Appellant relies heavily on a district court decision which rejected similar work-related stress claims filed by Carlisle's co-workers. *See Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073, 1090 (E.D.Pa.1989), *appeal dismissed on procedural grounds*, 899 F.2d 1360 (3d Cir.1990). In *Kraus*, four Conrail train dispatchers alleged emotional and physical injuries, including heart attacks, ulcers and nervous breakdowns, arising from their stressful work environment. Noting that the common law in this area is "less than clearly defined and in a stage of rapid evolution," the *Kraus* court concluded that most state and federal cases have required allegations of specific physical impact on the plaintiff or third parties, and thus held that "[j]ob-related stress is simply not the type of problem intended to be dealt with by the FELA." *Id.* at 1089-90 (relying on Marlowe, Comment, 33 Vill. L. Rev. 781 (1988)).

We disagree. The Supreme Court has held that "[t]he wording [of the FELA] was not restrictive as to . . . the particular kind of injury resulting." *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). Under this explication of the FELA, it is becoming more and more apparent that emotional and physical injuries that are the foreseeable result of requiring workers to remain in unreasonably dangerous and stressful work conditions for significant periods of time can present a claim under the statute.

Moreover, this conclusion, that a claim for negligent infliction of emotional distress arising from work-related stress is cognizable under the FELA, is not inconsistent with our prior FELA case law. In *Holliday* and *Outten*, this court on a case-by-case basis rejected FELA claims alleging negligent infliction of emotional distress, while refusing to foreclose the possibility of such recovery. In *Holliday*, a railroad worker allegedly suffered emotional and physical injuries because of his brief assignment to a job that he felt unqualified to perform. This Court affirmed the district court's summary judgment in favor of the railroad while stating:

> We emphasize that our opinion is narrow. We are not holding that there can never be a recovery under FELA for emotional conditions unless the employee suffers an immediate physical injury from the railroad's negligent conduct, or unless there is an accident of some kind, as we need not and do not reach that issue. Thus, our holding does not draw a "bright line" requiring a direct impact traceable to the employer's negligence before there can be a FELA recovery. We are not called upon to decide whether an employee exposed to dangerous conditions for a protracted time, though not in an accident, could recover.

914 F.2d at 426-27.

In *Outten*, we refused to permit recovery for negligent infliction of emotional distress resulting from the employee's reaction to an accident which occurred a mile from where the employee was located. The ground for our holding was that this result was not foreseeable:

> [I]t is hardly foreseeable to the railroad that one of its employees might suffer serious psychological injuries as a result of the fear of injury from a train collision over a mile away. There is a "perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' act."

928 F.2d at 79 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 361 (5th ed.1984)).

More recently in *Gottshall*, in reversing a district court's grant of summary judgment in Conrail's favor, we held that the FELA does permit recovery for claims for emotional and physical injury arising from negligent infliction of emotional distress under some circumstances.

Thus, we now have before us the issue which was defined but not faced in *Holliday*, *Outten*, and *Gottshall*: Can protracted exposure to work-related, stressfully injurious conditions lead to liability under the FELA? Under the circumstances of this case, where the injurious result was reasonably foreseeable, we conclude that it can.

The facts of record in this case demonstrate that Conrail had ample notice of the stressful and dangerous conditions under which Carlisle was forced to work. Carlisle passed on to his supervisors the complaints of his co-workers and subordinates about outdated equipment, long hours and the high level of job-related stress. He also communicated to them his own concerns about excessive hours and the stress of his job. At trial, he introduced into evidence a series of depositions, originally taken in the *Kraus* case, in which fellow workers in the Philadelphia Conrail offices testified that their jobs as dispatchers and supervisors had caused them to suffer cardiac arrests, nervous breakdowns, and a variety of emotional problems such as depression, paranoia and insomnia.[9] He also introduced two reports from the Federal Railway Administration ("F.R.A.") which documented the stressful nature of a train dispatcher's job and the outdated equipment and hazardous working conditions at Conrail's Philadelphia dispatching office.[10]

We conclude therefore that, when it is reasonably foreseeable that extended exposure to dangerous and stressful working conditions will cause injury to the worker, the employer may be held to be liable under the FELA for the employee's resulting injuries.[11] Specifically, under the facts of this case, we find that Carlisle presented sufficient evidence concerning (1) Conrail's duty to provide him with a safe workplace; (2) prior notice to

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[9] We agree with the district court's determination that these depositions were admissible for the purpose of showing the foreseeability of Carlisle's injury by establishing that Conrail had adequate notice of the stressful conditions of Carlisle's job and of the possible emotional and physical injuries that might result.

[10] We also agree with the district court that these reports were admissible to show foreseeability and notice to Conrail. The district court properly concluded that introduction of these reports was not prohibited under 45 U.S.C. § 41 because this evidentiary prohibition applies to F.R.A. reports investigating the causes of specific accidents, rather than the type of general safety conditions report in question here. *Carlisle*, 790 F.Supp. at 532.

[11] The injury here to Carlisle was emotional, accompanied by obvious physical manifestations. We do not face and do not decide the issue of whether purely emotional injury, caused by extended exposure to stressful, dangerous working conditions, would be compensable under the FELA.

Conrail, through the FRA reports and stress-related injuries to Carlisle's co-workers, making Carlisle's injury foreseeable to Conrail; (3) Conrail's breach of that duty through the hazardous conditions and demands of Carlisle's job; and, (4) causation of Carlisle's injuries by the demands of an unreasonably unsafe and stressful work environment.

III.

In this case, we uphold for the first time a claim under the FELA for negligent infliction of emotional distress arising from work-related stress. We reaffirm our holding in *Gottshall* that this Court adopts no single common law standard for weighing the genuineness of emotional injury claims. Rather, courts of this circuit should engage in an initial review of the factual indicia of the genuineness of a claim, taking into account broadly used common law standards, then should apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim.

Since 1908, when the FELA was adopted, the common law has evolved to where previously unknown claims for emotional injury are now broadly recognized. As medical science has also progressed, many courts have abandoned earlier common law standards used to screen claims, relying instead on expert testimony and a wider range of factual evidence to evaluate claims. Here, the evidence shows that Conrail drove its train dispatchers to work under highly stressful working conditions for long periods of time, knew of the potentially harmful effects of these conditions on Carlisle and his co-workers, and did nothing to alleviate them, causing a serious injury to Carlisle. The fact that Carlisle's injury, both emotional and physical, arose from work-related stress is no bar to recovery under the FELA as long as there is sufficient convincing evidence of the foreseeability of the result, of the causal nexus, and of the genuineness of his claim.

We will affirm the district court's denial of Conrail's motions for judgment n.o.v. or in the alternative for a new trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES E. GOTTSHALL,
Plaintiff,
v.
CONSOLIDATED RAIL CORPORATION,
Defendant.

Civ. A. No. 89-3102
September 30, 1991

MEMORANDUM AND ORDER

DITTER, District Judge.

In this Federal Employers' Liability Act case, plaintiff seeks damages for the emotional distress he suffered as a result of a co-worker's death. His employer, the defendant, Consolidated Rail Corporation, moves for summary judgment. After considering the record, both parties' briefs, and oral argument, I will grant the motion.

I. BACKGROUND

On August 10, 1988, plaintiff, James E. Gottshall, was replacing defective railroad track with seven other Conrail employees near Watsontown, Pennsylvania. The day was extremely humid and the temperature exceeded ninety degrees.

Replacing rails is hard physical labor, especially during hot weather. Moreover, on this day the group was under time pressure. For various reasons, the most strenuous activity did not begin until after noon, and supervisors instructed the group to finish the assignment by the end of the day.

In addition, these workers were mostly older. One man had previously suffered a heart attack and another a stroke. Conrail knew these facts and provided water at the work site, but discouraged the workers from taking frequent breaks because of the time pressure.

At about 2:45 P.M., Mr. Gottshall saw Richard Johns, a coworker and longtime friend, fall over. When workers reached Mr. Johns to assist him, they saw he was conscious. Someone gave Mr. Johns a cold compress and within five minutes, Mr. Johns was revived. The supervisor ordered the group back to work, and the employees complied without objecting. Mr. Johns continued to rest.

Five minutes later, Mr. Gottshall saw Mr. Johns fall again. Mr. Gottshall rushed to Mr. Johns and found him lying face down, turning white. Mr. Johns was not breathing, his heart was fluttering ever faster, his eyes were rolled back, and he was drooling. Mr. Gottshall began cardiopulmonary resuscitation ("CPR") on Mr. Johns, and was able to start Mr. Johns' heart momentarily. Mr. Gottshall continued his efforts until paramedics arrived.

In the meantime, Michael Norvick, Conrail's track supervisor, attempted to contact medical help. Conrail's standard procedure was to clear a radio channel and contact a dispatcher. At that moment, however, Conrail was repairing an intermediary radio base. Because the base was necessary for contacting emergency services, Norvick's radio was useless. Realizing that obtaining medical assistance from the worksite would be impossible, Norvick left in his car to summon help. Just before he reached a telephone, he was able to contact the emergency personnel by radio. He met them and lead them back to the worksite. This process took any where from thirty minutes to an hour.

When the paramedics arrived, Mr. Gottshall was performing CPR on Mr. Johns. Mr. Gottshall convinced the paramedics to use electric shock to revive Mr. Johns, but the efforts were unsuccessful. Ultimately, the paramedics decided they could do no more. They called the coroner and told the workers not to move the body before the coroner had examined it. The paramedics also directed everyone to remain at the scene until the coroner arrived.

From the outset, Mr. Johns death affected Mr. Gottshall. Other workers noticed he was emotional and upset during the incident.

Mr. Gottshall worked for the next four days, but was afraid he might suffer the same fate as Mr. Johns. Over the weekend, Mr. Gottshall felt ill. He lost his appetite, and though he was able to return to work on the following Tuesday, he went home early. Mr. Gottshall withdrew to his basement and his father eventually found him there a few days later. On August 27, 1988, Mr. Gottshall was admitted to the Northwestern Institute of Psychiatry.

At Northwestern, Mr. Gottshall was diagnosed as having depression and post-traumatic stress disorder with symptoms that included suicidal preoccupation, anxiety, sleep onset insomnia, cold sweats, repetitive nightmares, and weight loss. Another doctor identified various emotional disorders in Mr. Gottshall, and connected them to the incident.

Mr. Gottshall sued Conrail for negligent infliction of emotional distress.

II. ANALYSIS

Summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to a decision as a matter of law. An issue is genuine if a reasonable fact finder considering the evidence presented could find for the non-moving party. In deciding a summary judgment motion, I must view all facts in favor of the non-moving party.

With these principles in mind, I will address the merits of this case.

A. Emotional Injuries Under the FELA.

In *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), the Supreme Court refused to make a blanket rule governing emotional injuries under FELA. Rather, the court explained how "FELA jurisprudence gleans guidance from common-law developments," *id* at 568, 107 S.Ct. at 1417, and how there was little agreement among the various jurisdictions concerning emotional injury suits. The court concluded an *ad hoc* analysis was appropriate because recovery "could rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity." *Id.*

The court, however, clearly indicated that Congress intended FELA as a broad remedy to ensure railroad workplace safety, and "adopted a standard of liberal construction in order to accomplish Congress' objects." *Id.* at 562, 107 S.Ct. at 1414.

The Third Circuit discussed emotional injuries under the FELA in two recent cases. *See Outten v. National Railroad Passenger Corporation*, 928 F.2d 74 (3d Cir.1991); *Holliday v. Consolidated Rail Corp*, 914 F.2d 421 (3d Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 970, 112 L.Ed.2d 1057 (1991). In both, the court applied the *Atchison* approach and found the plaintiffs had not alleged recognizable tort claims.

In *Holliday*, the plaintiff was working as a conductor before he was fully trained to do the job. The position required the deployment of various switches, and the plaintiff made frequent mistakes. While the plaintiff did not cause any accidents, in one case, he almost crushed himself. Because of these errors, the plaintiff suffered acute stress and eventually developed severe physical symptoms. These problems forced him to stop working, and he sued the railroad under FELA. The district court granted summary judgment to the railroad.

The court of appeals affirmed noting that no recognized tort theory supported recovery. Judge Greenburg wrote every job creates stress, and that even under FELA's liberal standards, the plaintiff's injury was not compensable.

In *Outten*, a railroad employee mistakenly switched a train down the track where the plaintiff was working. Fearing a collision with electrical equipment on the track, the plaintiff fled for his life. Actually, the equipment was a mile down the rail, and the plaintiff was not hurt. After the incident, though, the plaintiff suffered psychological injuries and sued for negligent infliction of emotional distress.

Emphasizing FELA's broad, remedial purpose, the court applied Pennsylvania's relatively lenient bystander law. Despite this liberal test, the Third Circuit denied the plaintiff's claim because he could not have been physically hurt under the circumstances. In addition, the court also noted the plaintiff's injury was not foreseeable.

These cases make my inquiry clear. First, I must decide whether the events that caused Mr. Gottshall's injury show there was a breach of duty under common law that would support a claim for the negligent infliction of emotional damage. Second, I must inquire whether Mr. Gottshall can show the other basic elements of a tort claim: foreseeability, actual cause, proximate cause, and damages.

Mr. Gottshall cannot succeed at either step. First, his circumstances do not satisfy even the most liberal requirements for a negligent infliction of emotional damages claim. Second, Mr. Gottshall cannot show his injury was foreseeable and he cannot show actual or proximate cause.

1. *Negligent Infliction of Emotional Injury.*

As the *Outten* court noted, there are fairly strict limits on claims for negligent infliction of emotional injury.

Some states require a contemporaneous physical injury before there can be recovery for an emotional injury. Here, Mr. Gottshall has made no such allegation. Other states employ the zone of danger concept. *Dillon v. Legg*, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968), the seminal case in this area, held there is a duty to a bystander if he was located near enough to the accident, was closely related to the victim, actually witnessed the event, and this experience injured him.

Dillon is inapplicable here because Mr. Gottshall and Mr. Johns were not related, but other tests are less strict. Pennsylvania's zone of danger test is among the least restrictive. It requires a negligent force that was aimed at the plaintiff and put him in fear and danger of physical impact. *See Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84, 90 (1970). I will use the *Niederman* test here keeping in mind FELA's broad, remedial aims.

Applying this relatively liberal standard to the instant facts shows there is no liability.

At first glance, there is intuitive merit to the idea that Conrail negligently put Mr. Gottshall in danger. The men in the work gang were mostly older, at least two had a history of illness, the weather was extraordinarily hot and humid, and defendant clearly asked the men to perform very strenuous labor at a heightened pace. In some ways, there is no surprise that one of the workers became ill.

Nevertheless, drawing the zone of danger with such a generous negligence standard would indiscriminately sweep in countless workers. Under Mr. Gottshall's theory, every older Conrail employee who worked outside on

August 10, 1988, would satisfy the first requirement in the zone of danger test. For that matter, any company that asks its workers to work hard during any extreme weather conditions automatically would be held to have conceded the first element in the zone of danger test.

Such a result is simply bad law. Directing employees to perform necessary work, even though it is physically demanding and the weather is adverse, does not constitute negligence. Of course, negligence may exist if an employer does not take reasonable efforts to guard its workers against the risks of working under adverse conditions. Here, Conrail provided plenty of drinking water, and while the supervisors might have discouraged work and water breaks, no one forbade an employee's resting when he felt it necessary to do so.

The radio breakdown remains, though. Having employees work in a remote location without emergency communication raises a variety of issues, and in this case, the defendant violated its own standard of care.

Normally, Conrail employees who need emergency assistance can clear a channel on the railroad radio line. When Mr. Johns fell ill, Mr. Norvick followed procedure but was unable to summon help. He explained the intermediate communication base was under repair when he initiated his call. A technician had taken apart the computer without announcing the corresponding interruption in service. Essentially, defendant shut down its emergency system without telling anyone about it.

Even assuming the radio failure constituted negligence, Mr. Gottshall cannot show he was in the zone of danger. *Niederman* presents a two pronged test, and the

record shows Mr. Gottshall cannot satisfy its requirements.

Mr. Gottshall has alleged that before Mr. Johns became ill, there was a negligent force, the inoperable radio. For this period, however, Mr. Gottshall has not alleged fear. Furthermore, under the circumstances he could not possibly show he feared the lack of communication because the problem was not apparent until Mr. John's collapsed. Therefore, for the period before Mr. John's collapse, Mr. Gottshall can only show the first *Niederman* requirement.

Mr. Gottshall worked the day after the accident, and he claims he was afraid of having a heart attack and dying on the job. According to his testimony, this is the first time his fear appeared. Mr. Gottshall does not allege, let alone show, the radio problem continued after the accident. In fact, there is uncontradicted evidence to the contrary. Mr. Norvick testified he contacted a dispatcher on the radio while he was driving to get help.[1]

For this period, then, Mr. Gottshall can show the second *Niederman* requirement – fear – but he fails to allege the continued existence of a negligent force. In short, when Mr. Gottshall was subjected to the negligent force, he did not fear it would affect him – and by the time Mr. Gottshall feared he might have a heart attack and die on the job, the negligent force had ceased to exist.

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[1] Mr. Gottshall might have claimed Conrail had a policy of repairing its radio system without notice and that the negligent policy continued after the accident. This argument might satisfy the first *Niederman* requirement after Mr. Johns' death, but Mr. Gottshall never made this claim, and offers no evidence on it.

Since he cannot satisfy the liberal requirements of *Niederman* by showing the coexistence of danger and fear, Mr. Gottshall cannot show Conrail breached its duty to him.

B. The Other Elements of a Tort Claim.

Mr. Gottshall, however, maintains this is not a zone of danger case. Rather, he argues the entire chain of events reveals defendant negligently failed to provide a safe working environment for its employees. Mr. Gottshall claims this behavior violated FELA.[2]

Assuming for the moment that Mr. Gottshall's characterization of the case is correct, his claim still fails because he cannot satisfy other requirements of a tort claim.

1. *Foreseeability.*

As I have pointed out, the first necessary element in any negligence claim is the existence of a duty. However, there is not an unlimited duty to every possible plaintiff

on every possible claim. Instead, the scope of an actor's duty is limited to reasonably foreseeable risks under the circumstances. As a Pennsylvania appeals court wrote, "[t]he wrongful actions of a third party are not deemed to be foreseeable simply because the defendant could have speculated that they might conceivably occur." *Mathis v. United Engineers and Constructors, Inc.*, 381 Pa.Super. 466, 554 A.2d 96 (1989).

Even assuming defendant negligently failed to provide a safe working environment on August 10, 1988, Mr. Gottshall's injury was not a foreseeable risk. Here, the only possible breach of duty was Conrail's failure to provide emergency communication to employees working in a remote area. Such a mistake portends a number of foreseeable consequences. In fact, the most tragic occurred when Mr. Johns became ill and there was a lengthy delay before medical assistance arrived. To say, however, that Mr. Gottshall's injuries were foreseeable stretches things too far.

Another railroad case, *Dobelle v. National Railroad Passenger Corp.*, 628 F.Supp. 1518 (S.D.N.Y.1986) (applying Pennsylvania's *Niederman* test), is instructive. In *Dobelle*, a rail ripped through a train car and severely injured a group of passengers. The plaintiff's physical injuries were minor, but his emotional injuries were significant.

The *Dobelle* facts reveal the critical problem with Mr. Gottshall's case. In *Dobelle*, and other emotional damages cases, the negligent force created both the physical and emotional injury. The rail crashed through the car, maimed several people, and the *Dobelle* plaintiff thought,

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[2] Even this characterization of the case creates insurmountable problems for Mr. Gottshall. In *Holliday*, Judge Greenburg wrote that all jobs create stress, and that stress resulting from ordinary management decisions could not support a FELA claim. *See Holliday*, 914 F.2d at 425. In this case, Mr. Gottshall alleges problems with the total work environment: as he puts it "the entire ordeal." Since Conrail's decision to have the employees work on August 10, 1988, was not negligent, I consider it an ordinary management decision. Therefore, Mr. Gottshall's claim fails under *Holliday* because his injury was the result of an ordinary management decision.

"I was almost killed by that rail." As a result, he became emotionally distressed.

Mr. Gottshall alleges something quite different. Even assuming negligent radio repair caused Mr. Johns' death, Mr. Gottshall himself alleges he was injured by "the entirety of the ordeal." Mr. Gottshall saw Mr. Johns die and thought, "he died under these circumstances, I could too."

This situation is different from *Dobelle* where the rail was the result of the negligent conduct, the creator of the damage, and the stimulus for the emotional injury. Here, the inability to summon help was the result of the negligent conduct and is assumed to be the cause of Mr. Johns' death, but "the entire ordeal" was the stimulus for Mr. Gottshall's emotional injury. Although the communication breakdown is a common element, the cause of Mr. Johns' physical injuries and the cause of Mr. Gottshall's emotional injuries are different.

Since Mr. Gottshall cannot directly trace his emotional injuries to the negligence, his injury was not foreseeable.[3]

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[3] Plaintiff's reliance on *Althoff v. Consolidated Rail Corp.*, No. 87-4384, slip op., 1988 WL 61734 (E.D.Pa. June 13, 1988), is also misplaced. In *Althoff*, the plaintiff was actually operating the crane which caused the accident: he unleashed the negligent force. This fact led Judge Gawthrop to conclude there was a greater chance the plaintiff would suffer emotional harm. In this case, plaintiff was not unleashing the negligent force. Actually, if anything, he was a mitigating factor. As a result, plaintiff was not an "active participant" in the *Althoff* sense.

To hold otherwise would mean the defendant should have anticipated that by negligently repairing its radio, a man might have died in his friend's arms, and the friend would suffer significant emotional injuries. Such an attenuated sequence of events cannot be a foreseeable consequence.

2. *Causation.*

a. *Cause in fact.*

Mr. Gottshall also has a cause in fact problem which creates a deficiency like the one in *Outten*. Mr. Gottshall did not show Conrail's negligent act concerning the radio injured him by causing Mr. John's death.

There is simply no evidence that a faster emergency response could have saved Mr. Johns. Mr. Johns might have died if the paramedics had reached him more quickly; he might have died even if he had suffered the heart attack in a hospital.

In *Outten*, even though the wayward train actually frightened the plaintiff, the resulting crash could not have hurt him – he was a mile away from the accident. The court concluded plaintiff was out of the zone of danger because he was unable to show the negligence could hurt him.

Mr. Gottshall's position is similar. Because he cannot show the weather or the communication breakdown caused an injury that could harm him, he cannot show he was in a zone of danger. As in *Outten*, summary judgment is appropriate.

b. *Proximate cause.*

Finally, Mr. Gottshall's case poses a proximate or legal cause problem. A recent Pennsylvania Superior Court decision describes the concept:

> Even where harm to a particular plaintiff may be reasonably foreseeable from the defendant's conduct, and that conduct is the cause-in-fact of the plaintiff's harm, the law makes a determination that, at some point along the causal chain, liability will be limited. The term "proximate cause" or "legal cause" is applied by courts to those considerations which limit liability, even where the fact of causation can be demonstrated. Because of convenience, public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point, as no longer a "proximate" or "legal" consequence naturally flowing from the wrongdoer's conduct. To put it simply, at a certain point, negligent conduct will viewed as too remote from the harm arising to the plaintiff, and thus not a substantial factor in bringing about the plaintiff's harm. *Alumni Association, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan*, 369 Pa.Super. 596, 535 A.2d 1095, 1098 (1987).

In this case, both public policy and a rough sense of justice compel me to conclude Mr. Gottshall cannot show proximate cause. Mr. Gottshall's injury was just too far down the causal chain, and as a result linking defendant's negligence to the harm treats the defendant like an insurer.

It is one thing to hold employers liable for the direct consequences of specific, negligent acts. It is quite another to enforce liability when one negligent act causes a chain of events, and someone is injured down the road. In this case, Conrail created the communication problem, but it is not responsible for every consequence of the ensuing ordeal.

III. CONCLUSION

This accident was obviously a tragedy for everyone involved, and under different circumstances, another outcome might be appropriate. For the foregoing reasons, though, I find FELA does not provide a remedy for Mr. Gottshall's emotional injuries.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALAN CARLISLE,

Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,

Defendant.

Civ. A. No. 88-8752.
July 31, 1990

MEMORANDUM AND ORDER

GAWTHROP, District Judge.

Plaintiff, Alan Carlisle, instituted this suit under the Federal Employee's Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), against his former employer, Consolidated Rail Corporation ("Conrail"), alleging that stressful working conditions at Conrail caused him to suffer from depression, insomnia, and sleepwalking. Conrail has moved for summary judgment, claiming that Mr. Carlisle has not stated a claim cognizable under the FELA. For the reasons stated in this memorandum, I will deny Conrail's motion.

BACKGROUND

Mr. Carlisle began working for Conrail in 1973. He contends that, in 1983, his train dispatching duties began to include increased paperwork, computer-work, telephone communicating, and responsibility for moving

trains. Despite lodging numerous complaints with Conrail officials, he claims that work conditions continued to worsen to the point where in 1988, he was working 14-15 hour days, without any breaks for lunch or relaxation, seven days a week. He further contends that he was pressured by Conrail officials into writing false reports concerning Conrail's adherence to safety standards. Mr. Carlisle's complaint alleges that his increased workload caused him to live in fear of causing a tragic accident, and that as a result, he was forced to quit his job. He claims that at the time he terminated his employment, in 1988, he suffered from insomnia, sleep-walking, anxiety, paranoia, disorientation, and depression, and was on the verge of a nervous breakdown.

Mr. Carlisle has submitted the affidavits of five train dispatchers who worked with him at Conrail. Those affidavits support Mr. Carlisle's contentions that working conditions at Conrail during Mr. Carlisle's employment included long hours, few days off, few breaks, and extreme pressure to perform safely a dangerous job.[1] Mr. Carlisle has also submitted the affidavit of his replacement at Conrail, which alleges that stressful working conditions caused him to have a nervous breakdown seven months after taking over Mr. Carlisle's job.

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[1] Six of Mr. Carlisle's co-workers at Conrail have also instituted suits against Conrail, alleging that work-related stress at Conrail has caused them to suffer injuries which are compensable under the FELA, including heart attacks, depression, ulcers and nervous breakdowns.

DISCUSSION

The FELA states that railroads engaged in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 *et seq*. In *Urie v. Thompson*, 337 U.S. 163, 181-82 (1949), the Supreme Court emphasized the breadth of the language and the coverage of this provision:

> The language is as broad as could be framed . . . The wording was not restrictive as to . . . the particular kind of injury resulting. To read into this all-inclusive wording a restriction as to . . . the particular sorts of harms inflicted would be to contradict the wording, the remedial and humanitarian purpose and the constant and established course of liberal construction of the Act followed by this Court.

Mr. Carlisle contends that his claim falls under the FELA's broad language. Conrail asserts that plaintiff's claim should be dismissed for three reasons. First, defendant contends that emotional distress claims are not cognizable under the FELA. Secondly, it asserts that a precipitating physical injury is required to state an emotional distress claim under the FELA. Lastly, it asserts that work-related stress cannot form the basis of a FELA claim.

1. *Emotional Distress Claims Under The FELA*

The threshold issue in this case is whether emotional distress claims are cognizable under the FELA.[2] In *Atchison, Topeka and Santa Fe Railroad Co. v. Buell*, 480 U.S. 557, 568 (1987), the Supreme Court stated that emotional injuries may be cognizable under the FELA, but remanded the case to the lower court for "exacting scrutiny of the facts of the case."

Hence, negligent infliction of emotional distress claims may be cognizable under the FELA, depending on the facts of the case. *See e.g. Taylor v. Burlington Northern R. Co.* 787 F.2d 1309 (9th Cir.1986) (claim for emotional injuries based on harassment at workplace cognizable under FELA); *Teague v. National Railroad Passenger Corp.*, 708 F.Supp. 1344 (D.Mass.1989) (claim for emotional injuries based on harassment at workplace cognizable under FELA); *Althoff v. Consolidated Rail Corp.*, No. 87-4384, slip. op. (E.D.Pa. June 13, 1988) (Gawthrop, J.) (negligent infliction of emotional distress claim cognizable under the FELA in case where crane operator accidentally killed fellow employee); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135 (S.D.N.Y.1987) (claim for negligent infliction of emotional distress cognizable under the FELA where job harassment caused suicide); *Gillman v. Burlington Northern Railroad*, 673 F.Supp. 913 (N.D.Ill. 1987) (employees within the zone of danger of an accident that killed fellow employee stated a claim under the FELA).

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[2] Conrail cites numerous cases in which courts have denied recovery under FELA to plaintiffs alleging claims of intentional infliction of emotional distress. *See Netto v. Amtrak*, 863 F.2d 1210 (5th Cir.1989) (claim for intentional infliction of emotional distress not cognizable under the FELA); *Hammond v. Terminal Railroad Association of St. Louis*, 848 F.2d 95 (7th Cir.1988), *cert. denied* ___ U.S. ___, 109 S.Ct. 1170 (1989) (no claim for deliberate infliction of emotional distress under the FELA); *Adkins v. Seaboard System Railroad*, 821 F.2d 340 (6th Cir.1987), *cert. denied* ___ U.S. ___, 108 S.Ct. 452 (1987) (only negligent conduct, not intentional conduct, gives rise to a FELA claim). Mr. Carlisle's claim in this case, however, is one for negligent infliction of emotional distress.

2. *Physical Injury*

Conrail asserts that a precipitating physical injury is required to state an emotional distress claim under the FELA. In *Bullard v. Central Vermont Ry.*, 565 F.2d 193 (1st Cir.1977), the First Circuit held that only emotional distress resulting from physical injury was compensable under the FELA. In *Moody v. Maine Central R.R. Co.*, 620 F.Supp. 1472, 1473 (D.Me.1984), *aff'd* 823 F.2d 693 (1st Cir.1987), the district court held that "there can be no recovery for emotional disturbance under the FELA without some precipitating physical injury." On appeal, however, the First Circuit noted that the Supreme Court's decision in *Buell* casts doubt on whether physical injury is required to state an emotional injury claim under the FELA.

"While the traditional rule was that a plaintiff could not recover for mental injuries unconnected with actual or threatened impact, the majority of jurisdictions have abandoned that rule." *Buell*, 480 U.S. at 569 n. 20. Many recent cases have allowed FELA claims for negligent infliction of emotional distress where there is no precipitating physical injury. *See e.g. Taylor v. Burlington Northern*

R. Co., 787 F.2d 1309 (9th Cir.1986) (FELA claim recognized where injury is wholly emotional); *Teague v. National Railroad Passenger Corp.*, 708 F.Supp. 1344 (D.Mass.1989) (FELA claim recognized where there is some objective physical manifestation); *Halko v. New Jersey Transit Rail Operations Inc.*, 677 F.Supp (S.D.N.Y.1987) (FELA claim recognized where there is some objective physical manifestation).

The majority rule, today, is to allow recovery for "mental distress [when] certified by some physical injury, illness, or other objective physical manifestation." *Prosser and Keeton on Torts*, sec. 54 at 364 (5th ed. 1984). Plaintiff's allegations of insomnia and sleepwalking are, in my view, "objective physical manifestations" which satisfy the physical injury requirement for stating an emotional distress claim under the FELA.

3. *Work-Related Stress*

Conrail also contends that work-related stress cannot form the basis of a FELA claim. Defendant relies on *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073 (E.D.Pa.1989), in which Conrail workers who alleged emotional distress from dangerous working conditions were held not to have a claim cognizable under the FELA. The court stated that "plaintiffs, who allegedly suffer from stress-related physical or purely emotional injuries or illnesses caused by their general working conditions, fail to state a claim under the FELA." *Id* at 1090.

However, many cases allow FELA claims based on work-related stress. In *McMillan v. Western Pacific Railroad*

Co., 357 P.2d 449 (Cal.1960), the Supreme Court of California held that a train dispatcher who suffered a nervous collapse because of stressful working conditions stated a claim cognizable under FELA. In *Barker v. Consolidated Rail Corporation*, No. 85-5304 slip op. (E.D.Pa. January 24, 1986) (Weiner J.), a case involving a train dispatcher who worked with Mr. Carlisle at Conrail, this court held that a plaintiff stated a claim under the FELA where his heart attack was allegedly induced by excessive job stress. So too, in *Welby v. Consolidated Rail Corporation*, 671 F.Supp. 1016 (M.D.Pa.1987), plaintiff's claim that his heart attack was caused by improper and unsafe working conditions stated a claim under the FELA. *See also Yawn v. Southern Ry. Co.* 591 F.2d 312 (5th Cir.1979) (employees' allegation that railroad failed to provide sufficient help and adequate time for employees to do their work stated a claim under the FELA).

There is also ample caselaw holding that a claim for negligent infliction of emotional distress based on harassment at the workplace is cognizable under the FELA. *See Taylor v. Burlington Northern R. Co.*, 787 F.2d 1309 (9th Cir.1986) (harassment at work recognized as negligent infliction claim under the FELA); *Buell v. Atchison Topeka & Santa Fe Railway Co.*, 771 F.2d 1320 (9th Cir.1985) (harassment at work recognized as negligent infliction claim under the FELA); *Teague v. National Railroad Passenger Corp.*, 708 F.Supp. 1344 (D.Mass.1989) (embarrassment and humiliation at work recognized as negligent infliction claim under the FELA); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135 (S.D.N.Y.1987) (harassment on the job that led to suicide recognized under the FELA as a negligent infliction claim).

This court does not find a significant distinction under the FELA between work-related stress that causes a heart attack and job stress that leads to nervous conditions such as insomnia, sleepwalking, and depression. Just as work-related stress can lead to a heart attack, so too, such stress can lead to a nervous breakdown. This court sees no reason why the person who suffers a heart attack should have a claim under the FELA, while the person who has a nervous breakdown, does not.

This court also sees no difference between a negligent infliction of emotional distress claim based on harassment at the workplace, and a work-related stress claim such as Mr. Carlisle's. Harassment and job stress are similar – both may result in emotional injuries to employees, and both are often within the control of the employer. In my view, emotional injuries caused by stressful working conditions, which are accompanied by verifiable objective physical manifestations, constitute valid claims under the FELA.

CONCLUSION

Under Fed.R.Civ.P. 56(c), summary judgment will be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). All reasonable inferences are to be drawn in favor of the non-moving party. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970)

To create a question of fact for a jury in a negligence claim under the FELA, "the evidence may be minimal but it must be sufficient to provide the jury with some rational basis for concluding that some negligence of the railroad proximately contributed to the accident. The issue of negligence may not be submitted to the jury solely on the basis of conjecture." *Albergo v. Reading Co.*, 372 F.2d 83 (3d Cir.1966), *cert. denied* 386 U.S. 983 (1967).

In this case, where the plaintiff has alleged that stressful working conditions at Conrail have caused him to suffer emotional injuries, which are evidenced by verifiable objective physical manifestations, I conclude that there is ample rational basis for a jury to decide that Conrail's negligence caused Mr. Carlisle's injuries.

Hence, the order which follows.

ORDER

AND NOW, this 27th day of July, 1990, upon consideration of defendant Consolidated Rail Corporation's Motion for Summary Judgment, the response thereto, and oral argument, it is hereby ORDERED that the Motion is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALAN CARLISLE,
Plaintiff,
v.
CONSOLIDATED RAIL CORPORATION,
Defendant.

Civ. A. No. 88-8752.
March 23, 1992

MEMORANDUM AND ORDER

GAWTHROP, District Judge.

Plaintiff, Alan Carlisle, filed this suit under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA"), against Consolidated Rail Corporation ("Conrail"), his former employer, alleging negligent infliction of emotional distress. Plaintiff claimed that Conrail breached its non-delegable duty to provide him with a safe place to work by requiring him to work under unreasonably dangerous conditions, with foreseeable hazards to his health. The jury returned a verdict in favor of the plaintiff in the amount of $386,500, and Conrail now moves for judgment notwithstanding the verdict, claiming that Mr. Carlisle's evidence was not legally sufficient to present a question to the jury on the theory of negligent infliction of emotional distress under the FELA. Counsel also moves for a new trial, asserting a variety of trial errors. Upon the following reasoning, I shall deny both of defendant's motions.

DISCUSSION

I. *Motion for Judgment Notwithstanding the Verdict*

Granting a motion for judgment notwithstanding the verdict[1] is appropriate only if the trial record is "critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 1113 (3d Cir.1987), *cert. denied*, 484 U.S. 853, 108 S.Ct. 156, 98 L.Ed.2d 111 (1987). A judgment notwithstanding the verdict should only be granted when, without weighing the evidence, there can be but one reasonable conclusion as to the proper judgment. *Marian Bank v. International Harvester Credit Corp.*, 550 F.Supp. 456, 460 (E.D.Pa.1982), *aff'd*, 725 F.2d 669 (3d Cir.1983).

Defendant contends that the plaintiff's evidence was legally insufficient to sustain a jury's verdict, under the caselaw of the Third Circuit, because the plaintiff failed to establish: 1) an accident, physical impact, or injury to someone; 2) physical injury to himself as the result of an impact; 3) his placement in a zone of danger; 4) his witness of an accident resulting in physical injury to someone;[2] and 5) outrageous and unconscionable abuse directed at him.[3]

a. The law on negligent infliction of emotional distress claims under the FELA

Preliminarily, I disagree with defendant's characterizations of the law in this circuit. The Supreme Court in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987) decided that the Railway Labor Act ("RLA"), as the statute governing railway labor disputes, did not preempt an employee's FELA action seeking recovery for intentional and negligent harassment and intimidation from co-workers. In so doing, however, the Court declined to create a general rule as to whether a plaintiff can recover for purely emotional injuries under the FELA. While the court in *Buell* stated that the FELA should be liberally construed and suggested that some emotional injuries may be cognizable, *Id.* at 561-562, 107 S.Ct. at 1413-1414, it left the issue to the circuits, to decide whether employees could recovery for emotional injuries under the FELA and, if so, under what circumstances. "[T]he question whether one can recover for emotional injury may not be susceptible to an all-inclusive 'yes' or 'no' answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." *Id.* at 570, 107 S.Ct. at 1418.

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[1] At the time this motion was filed under Rule 50, that rule was titled "Judgment Notwithstanding the Verdict." Effective on December 1, 1991, the Rule was changed to "Judgment as a Matter of Law in Actions Tried by a Jury."

[2] This refers to the "bystander cases" under FELA which have no bearing on this case. *See e.g. Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir.1989) (denied recovery for emotional injury to plaintiff as a result of seeing his half-brother crushed to death between two ships). In *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir.1991), *reh'g granted en banc*, 954 F.2d 266 (5th Cir.1992), however, the Fifth Circuit reviewed *Gaston* and limited its impact, calling it "myopic prognostication." *Id.* at 1011 n. 8.

[3] This standard, used in claims for intentional infliction of emotional distress, is inapposite here where the plaintiff has made clear on several occasions that he is not pursuing such a claim.

Two circuits that have directly faced this issue have found that physical injury, physical contact, or immediate threat of physical contact is not required to prove negligent infliction of emotional distress under the FELA. *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1009 (5th Cir.1991); *Taylor v. Burlington Northern R. Co.*, 787 F.2d 1309, 1313 (9th Cir.1986). The Seventh Circuit, however, does require physical contact or the threat of physical contact before an emotional injury is cognizable under the FELA. *Ray v. Consolidate Rail Corporation*, 938 F.2d 704 (7th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 914, 116 L.Ed.2d 813 (1992).

The two Third Circuit decisions on this issue have not directly addressed the question expressly left open by the Supreme Court in *Buell:* whether physical contact, physical injury, or the immediate threat of physical contact is a required element for a FELA action for negligent infliction of emotional distress. The Third Circuit in *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 970, 112 L.Ed.2d 1057 (1991), declined to allow recovery for emotional distress caused by Conrail's placement of an employee in a position for which he was not qualified, for but a few days.

Focusing on the "nature of [the plaintiff's] injury and the character of the tortious activity," *Id.* at 423, the court held that even though plaintiff's emotional injury manifested itself physically, in the form of heart palpitations, spastic colon, involuntary rectal discharge, anxiety and depression, Conrail's allegedly tortious activity of placing the plaintiff in a job for which he considered himself unqualified for a short period of only a few days was "simply an ordinary management decision." *Id.* at 425.

The court, however, was careful to limit the breadth of its holding by explicitly stating,

> We emphasize that our opinion is narrow. We are not holding that there can never be a recovery under the FELA for emotional conditions unless the employee suffers an immediate physical injury from the railroad's negligent conduct, or unless there is at least an accident of some kind, as we need not and do not reach that issue. Thus, our holding does not draw a 'bright line' requiring a direct impact traceable to the employer's negligence before there can be a FELA recovery. We are not called upon to decide whether an employee exposed to dangerous conditions for a protracted time, though not in an accident, could recover. *Id.* at 427.

The Third Circuit's most recent decision in this area is *Outten v. National Railroad Passenger Corp.*, 928 F.2d 74 (3d Cir.1991). There, the plaintiff attempted to recover from Amtrak for negligent infliction of emotional distress, claiming he fled from his job site in fear of his life, when he thought two trains would collide near him. It turned out that he was at least a full mile from the point where the trains collided, and he had witnessed neither the initial impact nor the individual injuries.

Upon those facts, the court held that no theory permitted this particular plaintiff to recover under the FELA for his emotional injuries, noting as a Palsgrafian factor in its decision, that it was "hardly foreseeable to the railroad that one of its employees might suffer serious psychological injuries as a result of the fear of injury from a train collision over a mile away." *Id.* at 79. But in so holding, the court again limited its denial of recovery for emotional distress under the FELA to the specific facts of the case, stating that they were not "prepared to attempt to devise a litmus test for FELA claims based on negligent infliction of emotional distress that could be applied across-the-board because the Supreme Court has cautioned us to give 'exacting scrutiny to the facts of the case.'" *Id.* (quoting *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417).

One court in this district has faced claims similar to the one at bar. In *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073 (E.D.Pa.1989), *appeal dismissed on other procedural grounds*, 899 F.2d 1360 (3d Cir.1990), Judge McGlynn granted summary judgment to Conrail on the claims of four former Conrail train dispatchers. The train dispatchers brought claims for negligent infliction of emotional distress under the FELA, alleging that they had suffered injuries, ranging from the purely emotional for one plaintiff, to the physical – a heart attack – for another. They contended that their maladies were caused by Conrail's failure to provide them with a safe place to work, and, in particular, claimed that job consolidation, work force reduction, heavy workload, intense pressure from

job responsibility, loss of lunch and rest breaks, and chaotic working conditions at Conrail caused the stress that injured them.

After a thorough review of the caselaw on recovery for emotional injuries under the FELA, as well as the law on negligent infliction of emotional distress, the court in *Kraus* decided that the plaintiffs were allegedly injured by performing the normal duties of their jobs, as structured by management and monitored by the union, and concluded that job-related stress from general working conditions is not the type of problem intended to be dealt with by the FELA. *Id.* at 1090. In its review of the caselaw on negligent infliction of emotional distress, the court found that most states combine a foreseeability analysis with some kind of physical-contact or physical-manifestation requirement. Finding that there was no allegation that any of the *Kraus* plaintiffs had suffered physical contact, the court did not analyze the aspect of foreseeability, but instead concluded that the type of conduct alleged was not the type of conduct that has "led to the evolution of the negligent infliction tort." *Id.* at 1089.

With the utmost respect for the author of that opinion and with appreciation for his scholarly analysis of the common law and the FELA cases dealing with employees' emotional injuries, I must, nevertheless, disagree with the opinion's general conclusion. I am of the view that a plaintiff who incurs stress-related emotional or physical injuries, allegedly from Conrail's negligence in requiring its employee to work under conditions that are unsafe and harmful to an employee's health, does state a cognizable claim under the FELA. In so stating, I am quick to say that I do agree that stress can be an inevitable, daily – and non-actionable – concomitant of any job. It is only in the very most egregious circumstances, in which the psychological brutality of the conditions of the workplace has so bludgeoned the body and mind as to result in genuine debilitating physical repercussions, that a cause of action in this context should be countenanced.

At the outset, the fact that working conditions are at the "heart of labor-management negotiations" and part of a collective bargaining agreement, *Id.* at 1090, is not of dispositive consequence to the analysis of injury under the FELA. In holding that the FELA provides railway workers with substantive protection against negligent conduct independent of the employer's obligations under its collective bargaining agreement, the Supreme Court in *Buell, supra*, 480 U.S. at 562, 107 S.Ct. at 1415, explained that "presumably a host of personal injuries suffered by railroad employees are caused by negligent practices and conditions that might have been cured or avoided by the timely invocation of the grievance machinery . . . But we have never considered that possibility a bar to an employee's bringing a FELA claim for personal injuries." *Id.*

In determining that silicosis was an injury under the FELA, the Supreme Court in *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), recognized that nothing in the language[4] of the FELA or its legislative

history disclosed any express intent "to exclude from the Act's coverage any injury resulting 'in whole or in part from the negligence' of the [railroad] . . . On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable." *Id.* at 181, 69 S.Ct. at 1030. Although courts are legitimately concerned that recognizing the cognizability of FELA claims for emotional injury could open the floodgates of litigation, the court in *Plaisance, supra*, 937 F.2d at 1010, noted that a person who suffers emotional injuries from the negligence of another should not be denied recovery simply because there is a danger of false claims, a possibility of liability for remote or unforeseeable consequences, or the possibility that the injuries were only temporary. "An emotional injury can be every bit as harmful, debilitating, and destructive of the quality of one's life as a physical injury." *Id.* at 1009.

I agree. Were the courts to preclude a right to recover because of the danger of false claims, the courts could, under that theory, shut down shop entirely. The job of the trial courts is, largely, to provide that fact-finding forum in which the bogus claim can be sifted out from the bona fide one. Since at the *nisi prius* level, the law is usually well-settled, and the facts are not, it is the latter, factual area upon which litigation generally finds its principal focus: evaluating evidence, to find the truth. It is a task that courts across the land perform daily, with a fair degree of success. Were the courts to shrink from that task and preclude all lawsuits, simply because some plaintiffs are perjurious, greedy, and malingering, justice would ultimately be denied to millions of the legitimately injured.

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[4] The FELA, in pertinent part, provides: "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . . " 45 U.S.C. § 51.

Courts have indeed allowed FELA claims based on work-related stress. In *McMillan v. Western Pacific Railroad Co.*, 54 Cal.2d 841, 9 Cal.Rptr. 361, 357 P.2d 449 (1960), the Supreme Court of California held that a train dispatcher who suffered a nervous collapse because of stressful working conditions stated a claim cognizable under the FELA. In *Barker v. Consolidated Rail Corporation*, No. 85-5304 slip op., 1986 WL 1203 (E.D.Pa. January 24, 1986), a case involving a train dispatcher who worked with Mr. Carlisle at Conrail, Judge Weiner held that a plaintiff stated a claim under the FELA where his heart attack was allegedly induced by excessive job stress. So too, in *Welby v. Consolidated Rail Corporation*, 671 F.Supp. 1015 (M.D.Pa.1987), Chief Judge Nealon held that plaintiff's claim that his heart attack was caused by improper and unsafe working conditions stated a claim under the FELA. *See also Yawn v. Southern Ry. Co.* 591 F.2d 312 (5th Cir.), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 304 (1979) (employees' allegation that railroad failed to provide sufficient help and adequate time for employees to do their work stated a claim under the FELA).

Because I find, as did Judge McGlynn in *Kraus, supra*, 723 F.Supp. at 1089, that the law in this area is "less than clearly defined and in a stage of rapid evolution," *Id.*, and because both Third Circuit cases on the issue explicitly limited their holdings to the facts of each case, I conclude that the caselaw in this circuit does not mandate a physical contact to prove injury under the FELA. A plaintiff

does not have to prove physical impact resulting in physical injury to himself or the threat of physical contact caused by his placement in a zone of danger, in order to recover on a claim for negligent infliction of emotional distress under the FELA.

The objective-negligence standard used in *Plaisance* and adopted by Judge Hutton of this district in *Smolsky v. Consolidated Rail Corp.*, 780 F.Supp. 283, 290 (E.D.Pa.1991), after his own thorough review of the caselaw in this area, is the one I find to be appropriate in this situation. It permits an action for negligent infliction of emotional distress, where the plaintiff's claimed emotional injury resulted from a situation in which a reasonable person,[5] normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances. *Plaisance*, 937 F.2d at 1010. In *Smolsky*, the plaintiff made a claim for negligent infliction of emotional distress under the FELA, alleging a campaign of systematic and abusive harassment, sexual and non-sexual, by her supervisor. The court held that, in order to recover on her claim, the plaintiff must prove all the traditional common-law elements of negligence: duty, breach, causation, and foreseeability. *Smolsky, supra* at 290; *see Adams v. CSX Transportation, Inc.*, 899 F.2d 536, 539 (6th Cir.1990). I find this test for a claim of negligent infliction of emotional distress more in accordance with the evolving caselaw on emotional torts and the Supreme Court's broad construction of the FELA. Hence, my holding.

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[5] In this context, the reasonable railway employee, to which the courts must attribute "the appropriate daring and strength and quality of character," traits that generally belong to those who choose the railroad as a career. *Plaisance, supra*, 937 F.2d at 1011.

b. Application of the law to the facts of this case

In applying the negligence test to the facts of this case, I must determine whether plaintiff presented evidence at trial that was legally sufficient to get him to the jury on the question of negligent infliction of emotional distress. In so doing, I note that "where there is conflicting evidence which could lead to inconsistent conclusions, a judgment N.O.V. should not be granted." *Marian Bank v. International Harvester Credit Corp.*, 550 F.Supp. 456, 460 (E.D.Pa.1982), *aff'd*, 725 F.2d 668, 669 (3d Cir.1983).

In reviewing the evidence as to the negligence elements of duty, breach, causation, and foreseeability, on which I charged the jury, (N.T. May 20, 1991 at 157-162), it is clear from the outset that Carlisle has established duty on the part of Conrail, since the FELA imposes upon the defendant-employer a non-delegable duty to use reasonable care to furnish its employees with a safe place to work. *Sano v. Pennsylvania R.R.Co.*, 282 F.2d 936 (3d Cir.1960). Plaintiff claims that Conrail's breach of this duty, by requiring him to work under the strenuous conditions that he did, with the responsibilities he bore, for the length of time he did, caused his injury, and that Conrail knew or should have known that plaintiff's health was threatened by his work. As to these elements of breach, causation, and foreseeability, I must look to plaintiff's trial evidence to determine whether, if believed by the jury, it would support a verdict in his favor.

After starting as a train dispatcher for Conrail in 1976, he moved up to supervising other train dispatchers and, by 1981, was responsible for all the train movements in and out of Washington D.C., Baltimore, Wilmington and Philadelphia. Some of these trains carried passengers, but most carried freight, and a great deal of that freight was hazardous material. From 1984 to 1987, Conrail consolidated jobs and reduced its workforce. It shortened tracks, closed control towers, and lessened the number of switches on the rails, forcing the dispatchers and Mr. Carlisle, their supervisor, to make more decisions as to which trains could move where.

Before the tower operators were eliminated by Conrail, they had served as "the eyes and ears" of the train dispatchers, since the dispatchers had no visual way to monitor the trains from the Control Center. (N.T. May 14, 1991 at 119). The tower operators were analogous to forward observers in the field artillery; they would see where a train was on the track and send that information back to the train dispatchers at the Control Center. Without the visual aid of the control towers, or any computerization that simulated train movements – such as lights moving on a remote control board – to locate and monitor the movement of the trains, the plaintiff and the other train dispatchers had to use third-hand information from SEPTA and Amtrak tower operators and data from a computer that gave only the last checkpoint the train had passed. In order to communicate this information among the train dispatchers, Mr. Carlisle, and others who worked in the Control Center, would shout it out to whoever needed it, amidst telephones ringing and radios transmitting and receiving. Mr. Carlisle, along with the other train dispatchers, had to hold all this information in his memory. (N.T. May 14, 1991 at 120-121, 125, 127). Conrail gave him virtually no mnemonic assistance.

In 1988, Mr. Carlisle's already extensive job responsibilities shifted and increased. He was transferred to South Philadelphia operations in May of 1988, where he kept many of the train dispatching and supervisory responsibilities of his previous position. In addition, however, since Conrail had reduced the number of people working each shift from eleven to four, (N.T. May 14, 1991 at 100), Mr. Carlisle was given the responsibilities from what had previously been other jobs. He had to oversee several train yards in Philadelphia, enforce compliance with safety rules and perform the functions of a troubleshooter. As a troubleshooter, he had to go to the site of a train that was stopped for some reason, discover and remedy the problem – whether it be defective tracks, a bad switch, or vandalism – and perform various safety checks on the equipment, the trains, and the operating crews. (N.T. May 15, 1991 at 82). Mr. Carlisle testified that he had requested police protection many times, since the areas in which he had to check problems were often deserted train yards in dangerous areas, but that it was refused him. (N.T. May 15, 1991 at 83).

Beginning at the end of May, 1988, with the responsibilities of three jobs on his shoulders, Conrail required plaintiff to work fifteen-hour days, six to thirteen consecutive days at a time. For example, Mr. Carlisle went to work on August 7, 1988 at 6:00 p.m. He worked all through the night and then got off at 9:30 a.m., when he

would go home, try to spend some time with his wife and children, maybe get some sleep, and then be back at work at 6:00 p.m. again. This he did for eight consecutive days. In one two-week period, he worked in excess of 225 hours. During his time at work, Mr. Carlisle could not take any breaks for lunch or rest, (N.T. May 15, 1991 at 73, 112-117, 122, May 14, 1991 at 97). Plaintiff also introduced evidence to show that his supervisor verbally abused him at work and at home, calling in the middle of the night, and that during working hours, that supervisor had exhibited signs that he was drunk. (N.T. May 15, 1991 at 88-89, 92). As a train dispatcher, Mr. Carlisle was under pressure to achieve on-time performance for the trains, and he became more anxious when Conrail instructed him to ignore safety concerns, such as poor maintenance or malfunctioning equipment, which would have taken time to attend to. (N.T. May 15, 1991 at 30).

As his job responsibilities increased, his working conditions worsened, and his time on the job lengthened, the stress from work, plaintiff testified, was causing him mental and emotional pain that manifested itself physically. He felt severe fatigue and had headaches that would last all day. Because he had no appetite, he was losing weight – some 15-20 pounds, a significant amount for the not-so-hefty man the court observed at trial. He suffered from insomnia; during the few hours he did have off of work, he could not sleep. And one day, while driving to work, he blacked out at the wheel. His use of alcohol increased, as he tried to use it to get to sleep. When he did fall asleep, his wife would often find him sleepwalking, once with a lighted cigarette in his hand. (N.T. May 15, 1991 at 119-121, May 17, 1991 at 6, 9-10, 15).

Plaintiff fell into a major depression, and with it came a decrease in his awareness of what was going on around him, at home and at work. He feared that he was going to cause some serious damage to himself, to other people, or to property. (N.T. May 15, 1991 at 135, 139).

In addition to plaintiff's testimony that his working conditions were harming his health, Mr. Carlisle's treating psychiatrist and another psychiatrist, who provided expertise on the subject of stress, testified that he suffered from adjustment disorder that evolved into major depression, as well as from excessive use of alcohol – all, in reaction to anxiety and depression. In their opinion, his work caused his severe mental and physical health problems. (Videotape depositions of Dr. Lawrence Real and Dr. Paul Rosch). Even defendant's expert psychiatrist somewhat agreed; he testified that plaintiff did suffer from adjustment disorder caused, at least in part, by his work. (N.T. of Dr. Kenneth Kool, May 20, 1991 at 52-53).

I find that there was sufficient evidence for the jury to conclude that Conrail, in requiring Mr. Carlisle to work under conditions that were stressful and harmful in the extreme, breached its duty to provide him with a safe workplace. This is not the situation the Third Circuit faced in *Holliday, supra,* where the plaintiff suffered emotional harm from being put, for only a few days, in a position for which he felt unqualified. In the case at bar, Conrail exposed Mr. Carlisle to working conditions that were dangerous to his health for a protracted time. Cases have found that the FELA provides for recovery when an employer's negligence injures an employee through the employee's protracted exposure to harmful situations in the workplace, such as toxic industrial chemicals or harassment by other employees. *See e.g. Smolsky v. Consolidated Rail Corp., supra,* 780 F.Supp. at 291 (recovery under the FELA for sexual and non-sexual harassment); *Urie v. Thompson, supra* 337 U.S. at 180-182, 69 S.Ct. at 1029-1031 (recovery under the FELA for exposure to asbestos); *Taylor v. Burlington Northern R. Co., supra,* 787 F.2d 1309 (9th Cir.1986) (recovery under the FELA for harassment and physical threats); *Teague v. National Railroad Passenger Corp.,* 708 F.Supp. 1344 (D.Mass.1989) (embarrassment and humiliation at work recognized as negligent infliction claim under the FELA).

This court sees no real distinction between a negligent infliction of emotional distress claim based on harassment at the workplace, and a work-related stress claim such as Mr. Carlisle's. Harassment and job stress are similar; both may result in emotional injuries to employees, and both are often within the control of the employer. In my view, plaintiff's evidence that Conrail's breach of its duty caused his emotional injuries, if believed by the jury, was sufficient to support a verdict in his favor.

In turning to the perplexing problem of foreseeability, a factor that concerned the courts in *Outten* and *Kraus,* Mr. Carlisle presented evidence that tended to show that Conrail could have foreseen that Mr. Carlisle's working conditions were dangerous to his health, and that the stress of his job would and did cause his emotional injuries, with physical manifestations. Mr. Carlisle testified that he complained to his supervisors about the stress of his long hours and overwhelming job responsibility. (N.T. May 15, 1991 at 133). Plaintiff also introduced into evidence the depositions of six other Conrail train dispatchers who had all worked previously in plaintiff's same office. In the depositions, these witnesses testified that they had each suffered various medical illness ranging from heart attacks to nervous breakdowns, after being exposed to virtually the same working conditions as Mr. Carlisle. Mr. Carlisle, and the train dispatchers, in their depositions, testified that they told Conrail that unsafe working conditions and stress on the job had caused each of their illnesses. (N.T. May 15, 1991 at 12-23). This testimony was not admitted to prove that working conditions at Conrail caused the medical problems, *see infra*, but was admitted to prove notice to Conrail that the working conditions had become pervasively dangerous, or at least notice that the train dispatchers themselves believed that working conditions had caused their ailments.

Going to the issue of foreseeability, plaintiff read into evidence portions of two government reports, one made in 1974 and the other in 1987, on the medical and safety consequences associated with the stress of train dispatching, and plaintiff testified about the 1987 report. The 1974 report, a study of the job of train dispatcher, was not directed at any particular railroad, but it did find that the stress of their job caused negative medical consequences on the individual train dispatchers. Specific sources of stress noted in the report were the dependence on memory, inadequate staffing, the conflict between management's need for production and safety for the worker and the public, and the pressure for perfect performance, since a mistake could result in substantial injury. (N.T. May 17, 1991 at 61-65).

The report in 1987 was a Federal Railway Administration ("FRA") safety assessment of Conrail and its Philadelphia Office, where Mr. Carlisle worked. In particular, the report found that the dispatching workload was "excessive to the point that there was an appearance of having made decisions which were not well thought out." (N.T. May 17, 1991 at 67). The report noted its concerns that dispatchers are required to perform several other functions that are unrelated to the safe movement of trains and are forced to work in a necessarily disruptive environment, again, with phones ringing, radios blaring, and dispatchers shouting, necessary because there is no communications system between dispatching desks. The report found insufficient staff to provide relief for vacations, personal emergencies, or sickness, and it found that inefficient staffing decisions have forced dispatchers to work on rest days, and to forgo the familiarization trips required before a dispatcher is assigned to a particular track. (N.T. May 17, 1991 at 66-70). As to the conflict between production and safety, the report noted that "Too many middle and upper middle managers value quote 'production' end of quote over 'safety,' and fail to translate the organizational safety commitment into effective safety programs." (N.T. May 17, 1991 at 69).

Despite explicit recommendations to update the equipment used in the dispatcher's job, to reduce the workload per dispatcher, and to assure the availability of adequate dispatching personnel, (N.T. May 17, 1991 at 68), Mr. Carlisle testified that to his knowledge, he saw no change in these areas after the report came out; at least nothing was done in the Philadelphia office to alleviate or reduce the stressfulness of the train dispatcher's job.

(N.T. May 15, 1991 at 34). From the evidence presented by the plaintiff, the jury could have concluded that the 1974 report put Conrail on notice of the stressfulness of the train dispatcher's job, and of the medical problems caused by that stress. The 1987 report put Conrail specifically on notice that particular problems existed in the dispatcher's working conditions, creating a hazardous situation for the people who worked there. In addition, after Conrail received complaints by at least six other train dispatchers that the same conditions outlined in the 1987 report had caused their emotional and medical illnesses, the jury could have concluded that it was foreseeable to Conrail that working Mr. Carlisle for up to thirteen consecutive days, fifteen hours per day, under those stress-filled working conditions, would result in injury to Mr. Carlisle.

Plaintiff's evidence that Conrail negligently breached its duty to provide a safe workplace was legally sufficient to go to the jury. He presented evidence that tended to show that Conrail created hazardous working conditions, knew of their potentially harmful effects on plaintiff, and did nothing to alleviate them. Mr. Carlisle presented evidence that it was those stressful working conditions that caused his injury. Since the jury could reasonably have reached its verdict on the facts and the law, I shall deny defendant's motion for judgment notwithstanding the verdict.

II. *Motion for a New Trial*

Since granting the motion for a new trial acts to overturn a jury verdict, the court will not set aside the

jury's verdict unless "manifest injustice will result if the verdict is allowed to stand." *Emigh v. Consolidated Rail Corp.*, 710 F.Supp. 608, 609 (W.D.Pa.1989). A new trial should be granted only if there has been a miscarriage of justice. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940). The authority to grant a new trial is reserved almost entirely to the discretion of the trial judge. *E.J. Stewart, Inc. v. Aitken Products, Inc.*, 607 F.Supp. 883, 893 (E.D.Pa.), *aff'd*, 779 F.2d 42 (3d Cir.1985). Defendant Conrail moves for a New Trial under Fed.R.Civ.P. 59 for several reasons. I will address each one in turn.

a. Defendant's claim that the verdict is contrary to law and contrary to the evidence

For the reasons set forth in my discussion on defendant's Motion for Judgment Notwithstanding the Verdict, finding plaintiff's evidence legally sufficient to support a verdict in his favor, I conclude that the verdict is not contrary to law. Since defendant does not discuss any specific evidence that would show that the jury verdict in favor of plaintiff is against the weight of the evidence, I will not grant the motion on that ground either.

b. Defendant's claim that the court erred in admitting the depositions and testimony of other train dispatchers

Defendant claims it was error for the court to admit the depositions of, and testimony concerning, six train dispatchers who had all worked previously in plaintiff's same office. These witnesses testified that they each suffered various medical illness ranging from heart attacks to nervous breakdowns, after being exposed to the same working conditions as Mr. Carlisle. Their testimony, along with Mr. Carlisle's, was that they told Conrail that they had suffered these medical ailments because of the unsafe working conditions and stress on the job. Defendant claims this testimony was irrelevant and highly prejudicial.

On the contrary, I find that the testimony was relevant to Carlisle's notice of the probable dangerous effects that the train dispatcher's working conditions had on the person employed to do the job.[6] It tended to prove that at least Conrail knew that its train dispatchers linked working conditions with their medical problems. (N.T. May 15, 1991 at 10-12). The possibility that the evidence of other heart attacks, for example, might have suggested a causal link between employment as a Conrail train dispatcher, and Mr. Carlisle's injuries, was substantially lessened by a limiting instruction given by the court. (N.T. May 15, 1991 at 13-14). I instructed the jury:

> This evidence is not being admitted for proof of the matter asserted in the statement. That is to say, this evidence is not being admitted to prove that Joe Blow had a heart attack which he claims occurred on the job at Conrail. . . .
>
> It is being admitted for the very limited purpose of that so-called information having been transmitted to the powers that be at Conrail to put them on notice, as we say, to give them some inkling there might be some problem with the conditions on the premises.
>
> It is for that limited purpose of notice of whatever this so-called information – we know not whether it is true at this juncture – that that information was given to Conrail, to be a red flag to them that there might be some problem.

That evidence may be inadmissible on one theory does not preclude its admission entirely, should there be some other sound evidentiary theory of admission. Then, the inquiry turns rather to one of balancing. Any prejudice that Conrail claims to have suffered was outweighed by the probative value of the evidence on the issue of notice and foreseeability.[7] *See* Fed.R.Evid. 401 and 403.

Defendant further contends that it should have been allowed to show that the claims of four of these six testifying train dispatchers had been dismissed on summary judgment in another court proceeding. I disagree. While it is true that another court dismissed them, *see*

---

[6] The case at bar is unlike the situation in *Amatucci v. Delaware & Hudson Ry.*, 745 F.2d 180 (2d Cir.1984), cited by the defendant, where the trial judge elicited testimony on other engineers who had suffered heart attacks. There, the reversal seems to have turned on the fact that it was the judge, not counsel, who, over repeated objections and exceptions, persisted in asking a long series of questions, so that "the jury accordingly may have attached more weight to it." *Id.* at 184.

[7] Although not the explicitly the basis for my decision, the depositions of the train dispatchers and the 1974 and 1987 government reports, discussed *infra* could have been admitted under Fed.R.Evid. 702 as documents relied upon by plaintiff's expert, Dr. Rosch, in the formation of his opinion. Dr. Rosch testified that he did rely on these documents in order to reach his expert opinion.

Kraus v. Consolidated Rail Corp., supra, 723 F.Supp. 1073 (E.D.Pa.1989), evidence as to an injury is no less persuasive because a court has held that no cause of action exists to recover for that injury. The evidence was being offered solely to show that one District Judge had not found that a cause of action existed in those other cases. Their judicial disposition elsewhere was probative of nothing relevant to the fact-finder, but could have been highly prejudicial. I find now, as I did then, that under Fed.R.Evid. 403, this evidence would have unnecessarily confused the jury by, in essence, relitigating the other lawsuits, delving into "all the subtle distinguishing factual features and legal nuances between those and the case at bar," without offering anything substantial in probative value. (N.T. May 16, 1991 at 52-56). It would have been no more appropriate than for a court, in a products liability case, for example, after evidence of injuries and accidents had come forth – to prove notice to the manufacturer, to have permitted the manufacturer to bring in court records, or other evidence, showing that many of those accidents, upon coming to court, resulted in defense summary judgment victories and jury verdicts. The situation epitomizes the worthy purpose of Rule 403.

c. Defendant's claim that the court erred in admitting the 1974 and 1987 FRA Reports

Plaintiff introduced into evidence two studies of the Federal Railway Administration ("FRA"), one done in 1974, the other in 1987. As mentioned, these government documents, going to the issue of notice, were relevant. As for the hearsay aspect, they were admissible under

Fed.R.Evid. 803(8)(C), creating a hearsay exception for the admissibility of "factual findings resulting from an investigation made pursuant to authority granted by law." The Supreme Court, in *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988), applied that subsection, holding that a government study's conclusions and opinions, as well as its factual observations could be admitted into evidence; the document there at issue was a Navy investigative report, which included an opinion on the most probable cause of a Navy airplane crash.

Defendant argues that since the 1974 study was so remote in time, it was irrelevant to Mr. Carlisle's 1988 working conditions. Defendant points out that Conrail was not even in existence then, much less a subject of the study, and plaintiff did not come to work for Conrail until 1976. I find Conrail's arguments unpersuasive. Again, the report was only admitted to prove notice. It is indeed true that Conrail did not exist in 1974, the Penn Central bankruptcy not yet then having been fully resolved. But the same tracks existed. The same trains, the same observation towers, the same roadbeds, the same railroad routes existed. The industry was well established. The problems in the industry did not magically appear or vanish or metamorphose with the creation of Conrail. To a certain extent, a railroad is a railroad is a railroad – a beautiful means of transportation, but not without thorns.

If a government study is done in 1974 which concludes that use of a certain product may be dangerous, and a company is formed in 1976, requiring its employees to use that potentially dangerous product, that company cannot ignore the already existing literature in the field, with impunity. The 1974 study is certainly relevant to any action against the company for use of a dangerous product.

As to the 1987 study of actual Conrail Operations in Philadelphia, defendant claims that the study was inadmissible under 45 U.S.C. § 41, which prohibits the introduction into evidence of any portion of an accident report in civil lawsuits for damages. In particular, 45 U.S.C. § 41 provides that "[n]either the report required by section 38 of this title nor any report of the investigation provided for in section 40 of this title nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation." Defendant argues that the FRA's statement in the report, that one of the reasons why it was conducting the safety review was a series of accidents that occurred on the railroad, brings the 1987 safety study under the prohibition of 45 U.S.C. § 41. I find now, as I did at trial (N.T. May 16, 1991 at 46), that this generic study of safety concerns and accidents on the railroad was not the kind of report intended to be excluded from evidence under § 41. Section 41 precludes only the reports under Sections 38 and 40[8] from coming into evidence, these FRA reports not being under either section, the statute does not prohibit their admission. This safety report is distinguishable from an accident reconstruction report, where the government agency makes findings and conclusions about the causes or circumstances of one particular accident. The cases cited by defendant in its papers, *Protectus Alpha Navigation v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir.1985); *Minichello v. U.S. Industries, Inc.*, 756 F.2d 26 (6th Cir.1985); *Trochia v. Burlington Northern, Inc.*, 174 Mont. 83, 568 P.2d 558, *cert. denied*, 434 U.S. 1035, 98 S.Ct. 770, 54 L.Ed.2d 783 (1977), are not to the contrary, since they all involve the exclusion from evidence of government reports on one accident.

Finally, Defendant claims that plaintiff's reading of portions of the reports into evidence left the jury with a misleading impression of the complete report and prejudiced the defendant. Defendant did not object at trial on these grounds, and therefore, its objection is not preserved. In any event, defendant was not prevented from reading into evidence any other portion of the reports that was relevant to the issue at hand; defendant simply chose not to.

---

[8] Section 38 provides that it is the duty of every common carrier to make to the Secretary of Transportation, a monthly report, under oath, "of all collisions, derailments, or other accidents resulting in death or injury to any person or damage to equipment or roadbed, arising from the operation of such railroad, which report shall state the nature and causes thereof and the circumstances connected therewith . . . " 45 U.S.C. § 38.

Section 40 provides that the "Secretary of Transportation shall have authority to investigate all collisions, derailments, or other accidents resulting in serious injury to person or to the property of a railroad occurring on the line of any common carrier . . . The Secretary, shall have authority to investigate such collisions, derailments, or other accidents aforesaid, and all the attending facts, conditions, and circumstances . . . and shall, when he deems it in the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as he deems proper. Such reports shall be made public in such manner as the Secretary deems proper." 45 U.S.C. § 40.

d. Jury Instructions

Defendant claims that the court erred in not giving its jury instructions numbered 6, 7, 8, 9, 11, 16, and 17. The court did not give those jury instructions because they did not accurately characterize the law and were not supported by the evidence in the case. These instructions all dealt with defendant's contention that the law prohibits a cause of action under FELA for emotional injury caused by working conditions that were hazardous to plaintiff's health,[9] a subject discussed at probably too-great length, above. I did charge the jury quite fully in the language of *Holliday, supra*. For example:

> In order for Mr. Carlisle to maintain a claim for negligent infliction of emotional distress under the FELA, he must prove more than that he was placed for a few days in a position in some ways similar to his prior work assignment, but for which he was unqualified, and as a result, he suffered job-related stress and physical consequences attributable to his emotional state.
>
> Although an employee may feel that he received inadequate support help, was not permitted to take vacation days and worked in an understaffed office, and the employee claims to have suffered job-related stress injuries as a result of these employment conditions, such circumstances in and of themselves do not give rise to a claim under the FELA nor may Mr. Carlisle recover just because, in and of itself, he feared for the safety of others.
>
> If the heart of Mr. Carlisle's claim is that he did not like his new job of Train Master solely because it required him to work long hours and nights, then he has failed to state a claim under the FELA. While employees, in all walks of life, are placed in difficult, tense job situations, sometimes for extended periods, those placement decisions may be ordinary management decisions, and not of such a character that an employee's emotional reaction and related physical consequences to the placement, constitute an injury compensable under the FELA. The burden is on Mr. Carlisle to prove by a preponderance of the evidence that the emotional and psychological damages of which he complains, do exist and that they are a result of the negligence of Conrail. (N.T. May 20, 1991 at 156-157).

I find no errors in the other jury instructions given that would constitute a miscarriage of justice; all other aspects of the jury charge were in accordance with the law and the evidence in the case.

e. Statements of Plaintiff's Counsel

Defendant claims that plaintiff's counsel made two remarks that were so prejudicial that they constituted manifest injustice, mandating a new trial. One was during cross-examination of Mr. William Love, a Train Master who worked at times in 1988, in the South Philadelphia Yard with Mr. Carlisle. Plaintiff's counsel asked, "Mr. Love, did you understand that when you had your heart attack, based on the role that your physicians indicated that your job may have played, that you may have had a cause of action against Conrail?" (N.T. May 20, 1991 at 20-21). The court then asked the witness whether he knew what a "cause of action" was, and he said he did not. The court then stated: "I remind the jury that just because a lawyer says somebody may have a cause of action does not necessarily mean that that is so. I guess lawyers think everybody has a cause of action against everybody. That's why court's are busy." (N.T. May 20, 1991 at 21). With this interjected caveat and quick pooh-poohing of counsel's improper ploy, with an intentional bit of mocking levity, the court cured whatever slight prejudice might have come from plaintiff's counsel's question. The jury was also instructed, twice – once in the opening charge, once in the closing – that the questions of counsel are not evidence; that is only to be found in the answers.

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[9] One exception is defendant's jury instruction no. 9 which charged on the issue of intentional infliction of emotional distress, a claim never plead or pursued by plaintiff.

Lastly, defendant contends that when plaintiff's counsel allegedly broke the "Golden Rule" in summation, and that his misconduct so prejudiced the defendant as to call for a new trial. The use of the "Golden Rule" argument – that is, asking the jury to put themselves in the defendant's shoes – has been held by courts to be improper because it "encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1246 (7th Cir.1982), *aff'd on other grounds*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984).

In *Edwards v. City of Philadelphia*, 860 F.2d 568 (3d Cir.1988), the Third Circuit held, however, that the use of the "Golden Rule" argument is rendered harmless either by an immediate curative instruction or by a clear and complete jury instruction on the elements of the claim asserted and on the allocation of the burdens of proof. *Id.* at 574.

In the case at bar, plaintiff's counsel asked the jury, "If you were a defendant in which one of your employees was being accused of being a drunk and abusive, would you produce that employee?" (N.T. May 20, 1991 at 115). After objection and a sidebar conference with counsel, I immediately gave a curative instruction to the jury charging them that the "comment of counsel as to something to the effect that if you were the defendant in this case or whatever, you should disregard that entirely." (N.T. May 20, 1991 at 116). As to the second prong of *Edwards*, a clear and complete charge on the elements of plaintiff's claim and the burdens of proof was given in the jury instructions at the end of the trial, as well.

Having found no errors at trial that constitute such manifest injustice that a new trial is required, defendant's motion for a new trial will be denied.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1926

JAMES E. GOTTSHALL,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Appellee.

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil Action No. 89-03102)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBURG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges.*

(Filed March 11, 1993)

The petition for rehearing filed by appellee Consolidated Rail Corporation in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Greenberg and Judge Hutchinson would grant rehearing in banc. Judge Roth would grant rehearing for the reasons set forth in her dissent.

Supreme Court, U.S.
FILED
JUN 29 1993
OFFICE OF THE CLERK

(3)

No. 92-1956

In The
Supreme Court of the United States
October Term, 1992

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CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.
JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents.

◆

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

◆

RESPONDENT JAMES E. GOTTSHALL'S BRIEF IN OPPOSITION

◆

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals in *Gottshall v. Consolidated Rail Corporation* act properly in basing its decision upon an exacting scrutiny of the circumstances and common law developments?

2. In assessing common law developments, did the court of appeals in *Gottshall v. Consolidated Rail Corporation* act properly in declining to bind itself by any single state common law emotional injury test and in otherwise refusing to make broad pronouncements of law?

PARTIES TO THE PROCEEDING

This petition involves two cases decided by the United States Court of Appeals for the Third Circuit. The parties to *Gottshall v. Consolidated Rail Corporation*, in respect of which this Brief in Opposition is submitted, are James E. Gottshall, an adult citizen and resident of the Commonwealth of Pennsylvania, and Consolidated Rail Corporation, a publicly-held corporation. Mr. Gottshall is the plaintiff in the district court and was the successful appellant in the court of appeals. Consolidated Rail Corporation is the defendant in the district court and was the unsuccessful appellee in the court of appeals.

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No. 92-1956

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In The

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CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,

Respondents.

◆

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

◆

RESPONDENT JAMES E. GOTTSHALL'S BRIEF IN OPPOSITION

◆

In seeking certiorari in the instant cases, petitioner hopes for the opportunity to persuade this Court to graft onto the Federal Employers' Liability Act ("FELA") some form of all-encompassing state common-law-style "test" capable of foreseeing and fitting the myriad of factual situations potentially resulting in emotional injury. In short, petitioner hopes to lure this Court onto the same precipitous path heretofore followed by those state courts which have promulgated the patchwork of artificial paradigms whose irrationality and inconsistency have led to the very "confused, confounded, and sharply divided" state of the law upon which petitioner purports to found its claim.

Petitioner fails utterly to grasp the wisdom of this Court's opinion only six years ago in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 480 U.S. 557 (1987), wherein this Court wisely recognized the innumerable contexts in which emotional injuries may arise and declared that, "broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." 480 U.S. at 570. Respondent suggests that this Court does not need to revisit the issues addressed in *Buell,* and that all that is necessary to clear up any conflict over how to address emotional injury cases under the FELA is for this Court, in denying certiorari, to repeat its above-referenced admonition in *Buell,* and succinctly to point out that "glean[ing] guidance from common-law developments" does not equate to the mechanical application of particular common-law tests, especially when those tests vary from jurisdiction to jurisdiction and, however "carefully drawn," seem to require re-drawing every few years. In short, this Court should reject petitioner's invitation to forge yet another link in the chain of failed "tests" advocated by those who paradoxically believe in judicial prescience but not in the courts' ability to discern legal sufficiency, or its absence, in the cases actually before them.

◆

COUNTERSTATEMENT OF THE CASE

Any understanding of the *Gottshall* case requires a thorough scrutiny of the converging circumstances resulting in Gottshall's mental collapse and institutionalization.[1] These circumstances included: (i) the extreme and unusual working conditions which caused Richard Johns, one of Gottshall's co-workers and close friends, to collapse and die of a heart attack; (ii) Gottshall's exposure to those same extreme conditions, both before and after Johns' death; (iii) Gottshall's intimate and active involvement in Johns' death; and (iv) petitioner's negligent and flagrant disregard of the extreme working conditions to which it exposed Gottshall and his co-workers, both before and after Johns' death.

The first component of the atypically severe working conditions to which petitioner subjected Gottshall and his co-workers was the weather. The day Johns died occurred during one of the most severe heat waves in recent memory. Gottshall's boss, Conrail Track Supervisor William Yetter, admitted to being unable to remember a spell which had been so hot for so long in over forty years. As accurately summarized by the Third Circuit, "On the day of the accident, the temperature was hovering at 97 degrees; it was humid; the sun was shining; the field was in the open; and work started at high noon." (A-47).[2] As a result of these conditions, the workers were apprehensive, and they complained repeatedly to their supervisors.

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[1] Supreme Court Rule 24.1(h) requires the inclusion herein of "all that is material to the consideration of the questions presented." Because this Court has indicated that FELA emotional injury cases should turn on an exacting scrutiny of their facts, *Buell,* 480 U.S. at 568, respondent offers the ensuing detailed review bringing together the discussion set forth throughout the Third Circuit's Opinion. See pages A-2 through A-6 and A-47 through A-50 of petitioner's appendix.

That the weather conditions that day were extreme is admitted by petitioner. Dr. David Deubner, petitioner's Chief Medical Officer, for example, defined "extreme weather conditions" as being "when it's hot, it's humid and the sun is shining," and related Conrail's purported policy of taking special precautions under such conditions: "If people are doing very heavy cardiovascular labor, then it should be slowed down and have longer work breaks, more frequently longer breaks when it gets very hot and humid. . . . that's why when the sun gets too high, you recommend slowing down and having more rest." (A-47, A-48).[3]

Contrary to Conrail's avowed policy of slowing down in the face of extreme weather conditions, however, Gottshall's supervisors actually speeded the men up, forcing them to work well beyond their usual pace and, to make matters worse, disallowed scheduled work breaks and discouraged unscheduled breaks. Importantly, all of these actions were in contrast to the usual working conditions to which Mr. Gottshall and his co-workers were normally subjected. As stated by the Third Circuit, "[t]here is . . . evidence that conditions that day were anything but 'ordinary,' much less characterized as negotiated circumstance." (A-53). According to one of Gottshall's co-workers, "[t]he conditions at the Watsontown Secondary on the date of the accident were substantially more severe than the general working conditions associated with the job. The extreme heat and humidity, and the pace of the work, were unbearable." (A-53). Another of Mr. Gottshall's co-workers that day swore that, "[w]orking on a division gang can be strenuous. However, the situation on the date of Mr. Johns' death, involving extreme heat, no breaks, no shade and being pushed very hard, was something different." (A-53, 54). As Mr. Gottshall described it, "It was 97 degrees. It was hot and humid. They put us out there to change rails, push, push, push. . . . I'm not an animal." (A-54).[4]

After two and one half hours of continuous toil under these extreme working conditions, Richard Johns, one of Mr. Gottshall's co-workers, and a close friend of fifteen years, collapsed. Though Johns was pale and sweating profusely, supervisor Michael Norvick neither took Johns from the worksite nor sought medical assistance. Indeed, Norvick ordered Johns' co-workers to stop assisting Johns and get back to work. About five minutes after they did so, Johns collapsed a second time. At that point, Gottshall rushed back to Johns, where he confronted a gruesome sight. As described by the Third Circuit, "Johns had turned white; his teeth had been knocked out by the fall; his eyes were rolled back; he was gasping for breath; his heart was fluttering; and saliva was drooling from his mouth." (A-3). For the next forty five minutes, Gottshall desperately administered cardiopulmonary resuscitation, during which he intermittently wept and urged Johns to revive, repeating, "[c]ome on Dick, breathe, breathe." (A-5).[5]

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[2] All page references are to petitioner's appendix.

[3] Dr. Deubner also advocated what he referred to as an employee's "safe function capacity," which he explained as the matching of an employee's job to his physical health. (A-48). The conditions faced by Mr. Gottshall's co-workers on the date of the accident, however, were a clear violation of this concept. The man who died, for example, Mr. Johns, was 56 years old, was 5'1/2" tall and weighed 187 pounds, and suffered from high blood pressure, athero or arteriosclerotic cardiovascular disease, and was taking medication. (A-48). And as petitioner knew, many if not most of Mr. Gottshall's other co-workers were overweight, and between fifty and sixty years old. One of them had previously suffered a heart attack. *Id.*

[4] As Mr. Gottshall understood it, the reason for the accelerated pace of the work notwithstanding the weather conditions was that petitioner had violated a railway safety regulation and knew it was scheduled for a safety inspection.

While Gottshall tried to revive Johns, supervisor Norvick was busy speeding along old country roads searching for a place to call for help. Under normal circumstances, Norvick simply could have called for help on his Conrail communications equipment. On the date of Johns' death, however, the equipment was useless because Conrail had taken its Turbotville base station off the air for repairs, without telling anyone. Eventually, Norvick was able to summon help and led a team of paramedics to the remote worksite. By then, of course, it was too late for Johns.

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[5] Though supervisor Norvick believed CPR training was a good idea because of the men's ages, Gottshall was the only one at the worksite who had been trained in CPR because petitioner had cancelled a training session set up by the American Red Cross due to the "liability factor."

As Norvick saw it, however, it was not too late to finish the job, and he ordered the men back to work. While Gottshall and the others endeavored to complete their task in the hot sun, Johns' corpse laid in open view on the gravel beside the track and "bake[d] like a potato." (A-54). Even after the work was finished, Norvick required the men to remain at the worksite until the coroner arrived, which was not for a full three hours after Johns' death. (A-52).[6]

The following day, when Gottshall reported to work, he was reprimanded for administering CPR to Johns and, along with his co-workers, sent back to work under the same extreme weather and working conditions that had killed Johns. During this time, Gottshall became increasingly frightened that he would die as Johns had. He started feeling sick and lost his appetite. A few days after John's funeral, Gottshall informed his supervisor he was sick and wanted to go home. As Gottshall recalled the conversation, "I had to explain to him after all of this heat and exhaustion, I'm getting sick and I can't take it, I'm going home and taking a couple of days off, and I just got sick and just couldn't go back anymore." (A-6).

When Gottshall went home, he retreated into his basement, where he was found several days later by his father. Shortly afterward, Gottshall was admitted to the Northwestern Institute of Psychiatry. He remained there for three weeks, during which time he was diagnosed as suffering from major depression and post-traumatic stress disorder. In addition to loosing forty pounds, Gottshall suffered suicidal preoccupations, anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares of the death scene and a fear of leaving his home. Since his discharge, Gottshall has continued to receive out-patient psychological treatment.

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[6] It was the coroner's opinion that Johns died from a heart attack brought on by excessive heat and humidity in conjunction with heavy physical exertion. The coroner also concluded that had Johns received prompt medical attention, his chances of survival would have been materially enhanced.

Gottshall filed a complaint against petitioner with the United States District Court for the Eastern District of Pennsylvania, raising a claim of negligent infliction of emotional distress under the Federal Employers' Liability Act, 45 U.S.C. Section 51, *et seq*. The district court granted petitioner's motion for summary judgment (A-91 through A-100), primarily on the grounds that Gottshall failed to satisfy the "zone of danger" test adopted by the Pennsylvania Supreme Court. (A-97 through A-100). Inexplicably disregarding virtually the entire factual record relating to petitioner's negligence, the district court also found that Gottshall failed to satisfy the traditional common law tort elements of foreseeability and causation. (A-100 through A-105).

The court of appeals reversed. (A-1 through A-72). Adhering closely to this Court's pronouncements in *Buell*, the court of appeals reviewed in detail the circumstances surrounding Gottshall's emotional collapse and then, recognizing the tension between the anti-fraud policy underlying common law emotional injury tests and the liberal policy of the FELA, charged itself with reconciling that tension by, "discerning the trends and developments in common law and then gauging them according to the policy underlying FELA, for FELA is at issue here and creates the cause of action." (A-24).

Citing the dynamic remedy created by the FELA and the FELA's departures from common law, the court of appeals concluded that state common law tests are not the *sine qua non* for determining whether and to what extent emotional injury claims are cognizable under the FELA. (A-25 through A-30). Rather, the court of appeals reasoned that the best way to promote the policies underlying both the FELA and the state common law tests was through an exacting scrutiny of the facts to determine whether a plaintiff's claim (i) had a "solid basis" in common law and (ii) satisfied traditional tort elements. Because Gottshall's claim met both burdens, the court of appeals reversed the district court.

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REASONS FOR DENYING THE WRIT

This Court should not grant certiorari in the *Gottshall* case because: (1) this Court should not bind the lower courts with rigid tests by which to measure the legal sufficiency of FELA emotional injury claims, as (a) such claims involve an array of tortious activities and resulting injuries whose variety does not lend itself to analysis under any particular test, as is made clear by the unfortunate experience of the state courts, (b) any attempt to bind the courts with narrow mechanistic tests would contravene both the remedial goal of the FELA and the Act's intent to vest the courts with authority to expand the Act's coverage as the state of law develops, and (c) the common law concepts of duty, breach, foreseeability and cause constitute sufficient analytical "uniformity" against which to measure FELA emotional injury claims and separate the good from the bad; and (2) the Third Circuit Court of Appeals' decision in *Gottshall* was based upon a thoughtful and intensive scrutiny of the circumstances involved and otherwise squares perfectly with the applicable precedents of this Court and the intent of the Federal Employers' Liability Act. Finally, because the *Gottshall* decision turned on its particular facts, certiorari is inappropriate.

I. THIS COURT SHOULD NOT BIND THE LOWER COURTS WITH RIGID "TESTS" OR ABSTRACT RULES OF LAW AGAINST WHICH TO MEASURE THE LEGAL SUFFICIENCY OF FELA EMOTIONAL INJURY CLAIMS.

Only six years ago in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court wisely recognized that:

> "The question whether 'emotional injury' is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case. . . . [W]hether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity."

480 U.S. at 568. This Court also stated that, "[a]s in other areas of law, broad pronouncements in [the area of FELA jurisprudence] may have to bow to the precise application of developing legal principles to the particular facts at hand." 480 U.S. at 570. Consistently, because this Court was presented with an incomplete factual record in *Buell*, it was unable to determine the legal sufficiency of respondent's claim.

Petitioner here seeks this Court to put an end to the developing state of common law relating to FELA emotional injury cases and to eschew the view expressed in *Buell* that the legal sufficiency of such claims should rest on a scrutiny of the facts involved in each particular case. In their place, petitioner apparently hopes this Court will promulgate and impose upon the lower courts some sort of narrow, state-common-law-style test against which mechanically to evaluate claims of emotional injury brought pursuant to the FELA. Petitioner argues that such a test is necessary because FELA emotional injury litigation "deserves" a "uniform approach." (Petition at 12). Petitioner is wrong for a number of reasons. First, it would be impossible to devise a test capable of addressing the vast array of tortious activities and resulting injuries giving rise to emotional distress. Second, any exclusionary line drawing would contravene both the remedial goals of the FELA and the Act's intent to vest the courts with authority to expand the Act's coverage concomitant with the evolution of the common law. Third, the common law concepts of duty, breach, foreseeability and cause have proven sufficient tools with which the courts can weed out meritless claims.

As to the first point, emotional injury cases brought in the federal courts under the FELA involve a multitude of tortious activities. *Carlisle v. Consolidated Rail Corporation*, 990 F.2d 90 (3d Cir. 1993) (unreasonably stressful working conditions); *Ray v. Consolidated Rail Corporation*, 938 F.2d 704 (7th Cir. 1991) (threats, harassment and intimidation by supervisor); *Elliot v. Norfolk & Western Ry. Co.*, 910 F.2d 1224 (4th Cir. 1990) (false accusations, assignment to jobs for which employee was unqualified and physically unable to work); *Holliday v. Consolidated Rail Corporation*, 914 F.2d 421 (3d Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991) (placing employee into position for which he was unqualified, resulting in employee mistakes and near-accident); *Adams v. CSX Transportation, Inc.*, 899 F.2d 536 (6th Cir. 1990) (abuse by supervisor); *Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1989) (witnessing crushing death of half-brother); *Netto v. Amtrak*, 863 F.2d 1210 (5th Cir. 1989) (harassment during investigation into alleged improprieties); *Gillman v. Burlington Northern Railroad Co.*, 878 F.2d 1020 (7th Cir. 1989) (witnessing death of co-worker); *Stoklosa v. Consolidated Rail Corporation*, 864 F.2d 425 (6th Cir. 1988) (overwork, ridicule and demotion); *Hammond v. Terminal Railroad Association of St. Louis*, 848 F.2d 95 (7th Cir. 1988) (meritless disciplinary charges, unrealistic work demands and other harassment); *Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366 (9th Cir. 1987) (false accusations of intoxication); *Robert v. Consolidated Rail Corporation*, 832 F.2d 3 (1st Cir. 1987) (retaliatory disqualification from job, subjecting employee to unnecessary scrutiny and other harassment); *Taylor v. Burlington Northern Railroad Co.*, 787 F.2d 1309 (9th Cir. 1986) (assault; racial and sexual harassment); *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807 (7th Cir. 1985) (assault by supervisor); *Althoff v. Consolidated

Rail Corporation*, No. 87-4384, slip op. (E.D. Pa. June 13, 1988) (plaintiff operated crane which killed co-worker); *Amendola v. Kansas City S. Ry. Co.*, 699 F. Supp. 1401 (W.D. Mo. 1988) (fear of contracting work-related disease); *Smolsky v. Consolidated Rail Corporation*, 780 F. Supp. 283 (E.D. Pa. 1991) (sexual harassment); *Bloom v. Consolidated Rail Corporation*, No. 89-7452, slip op. (E.D. Pa. February 4, 1993) (plaintiff operated train which struck and killed pedestrian); *Teague v. National Railroad Passenger Corporation*, 708 F. Supp. 1344 (D. Mass. 1989) (employee threatened with job loss if he failed to rule against union members at hearings, and was chastised for reporting safety violations); *Kraus v. Consolidated Rail Corporation*, 723 F. Supp. 1073 (E.D. Pa. 1989), *appeal denied*, 899 F.2d 1310 (3d Cir. 1990) (consolidation of job tasks).

In addition to involving varied and sundry liability fact patterns, FELA emotional injury cases also involve a myriad of injury scenarios. *Carlisle* (major depression and nervous breakdown with attendant symptoms of insomnia, fatigue, headaches, sleepwalking and weight loss); *Ray* (mental breakdown); *Elliot* (mental distress with attendant symptoms of dizziness, weakness, faintness, stuttering, crying, and headaches); *Holliday* (spastic colon, nightmares, anxiety, depression, involuntary rectal discharge); *Adams* (emotional breakdown and institutionalization); *Gaston* (post-traumatic stress disorder); *Stoklosa* (chest pain, fatigue, depression); *Pierce* (fatal heart attack); *Robert* (non-fatal heart attack); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F. Supp. 135 (S.D.N.Y. 1987) (suicide).

The state courts' experience with non-FELA cases makes clear the futility of attempting rigid or static "tests" by which to measure emotional injury claims. Such paradigms have invariably proven too narrow and requiring of constant revisitation and revision. The Third Circuit's analysis in *Gottshall* of the history of emotional injury law in Pennsylvania is instructive. (A-60 to A-61, n.8). Before 1970, Pennsylvania applied the "physical impact" rule with "obstinate rigidity." Then, in *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970), the Pennsylvania Supreme Court adopted the more inclusive "zone of danger" test, only to change its mind again nine years later and adopt the "bystander rule" of recovery in *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979). This unfortunate affinity for drawing and then redrawing lines in the sand has been shared by most other jurisdictions as well, with the result that, " '[t]he case law in the field [of emotional distress] is in an unparalleled state of confusion and any attempt at a consistent exegesis of the authorities is likely to break down in embarrassed complexity.' " *Carlisle v. Consolidated Rail Corporation*, (A-79)(quoting Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2d 100, 103 (1959) (footnotes omitted)). There is some indication, however, that the state courts are finally beginning to free themselves of their artificial tests, albeit begrudgingly. *See Leong v. Takaski*, 520 P.2d 758, 55 Haw. 398, 403 (1974) (" . . . the trend is a hesitant abandonment of such artificial restrictions and barriers to recovery in favor of a greater reliance on general tort law principles and the contemporary sophistication of the medical profession to test the veracity of claims for relief").

Closing its eyes to the confusion created by the state courts as they have haphazardly traded in one "carefully drawn" test after another, petitioner here seeks the opportunity to persuade this Court to devise its own test in order to afford this area of federal law a "uniform approach." (Petition at 12). As the Third Circuit Court of Appeals stated in *Gottshall*, however:

> Although a fact-specific analysis may mean losing the comfort and security that bright-line, arbitrary rules afford, FELA jurisprudence cannot be reduced to a set of rules that mechanistically drive results without exacting scrutiny of the facts as they bear upon such considerations as the employer's duty to provide a safe workplace, the nature of the alleged tortious conduct, the injury, and the underlying equities.

(A-35). However tantalizing, a "green is go, red is stop" rule simply will not accommodate FELA litigation.

In addition to proving fruitless, any attempt to bind the lower courts with narrow mechanistic tests in this area would contravene the broad remedial goal of the FELA and the Act's intent to vest the courts with authority to expand the Act's coverage as the state of law develops. This Court has recognized the FELA as a broad, remedial act and has adopted a " 'standard of liberal construction in order to accomplish [Congress'] objects.' " *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. at 562 (1987), *quoting Urie v. Thompson*, 337 U.S. 163, 180 (1949). Consistently, this Court has expressly refused to read restrictions into the Act or otherwise stall the development of FELA jurisprudence. *Urie v. Thompson*, 337 U.S. at 181. As this Court stated in *Urie*:

> To read into this all-inclusive wording [of FELA] a restriction as to the kinds of employees covered, the degree of negligence required or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this court.

337 U.S. at 181-82, *quoted in Gottshall v. Consolidated Rail Corporation*, (A-29). In *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), where this Court extended the negligence *per se* doctrine beyond common law limitations, the Court importantly recognized that, "Congress did not intend to create a static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers." 355 U.S. at 431. In other words, "Congress left the onus of fashioning remedies to the courts in a manner analogous to the development of common law tort remedies." *Gottshall v. Consolidated Rail Corporation*, (A-25).

The last reason this Court should not bind the lower courts with a test against which to measure the legal sufficiency of emotional injury cases under the FELA is, simply, that such a test is unnecessary; the existing common law tort requirements of duty, breach, foreseeability and causation, coupled with the lower courts' sensitivity to the policy reasons against too broad a remedy, have already proven sufficient devices by which to separate the wheat from the chaff. The history in the Third Circuit is particularly illuminating. Before the Third Circuit's decision in *Gottshall*, that court reviewed two other claims of emotional distress brought under the FELA. *Outten v. National Railroad Passenger Corporation*, 928 F.2d 74 (3d Cir. 1991); *Holliday v. Consolidated Rail Corporation*, 914 F.2d 421 (3d Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991).

In *Holliday*, the plaintiff was required to work over his objections as a conductor along a particular area of track where he did not feel qualified to operate. Though his asserted inadequacy did not result in an accident, the plaintiff claimed he often threw the wrong switches and once was almost crushed during a switching operation. According to the plaintiff, all of this caused him stress and he started to experience a number of disorders, including heart palpitations, sleep disorders, nightmares, spastic colon, anxiety and depression. In evaluating the legal sufficiency of the plaintiff's claim, the Third Circuit followed this Court's lead in *Buell* and focused its attention on the " 'nature of the injury and the character of the tortious activity.' " 914 F.2d at 423, *quoting Buell*, 480 U.S. at 568. Affirming the district court's grant of summary judgment in favor of the railroad, the Third Circuit emphasized that the plaintiff's claim arose solely as a result of everyday job stresses and resulted in no physical injuries whatsoever, either to the plaintiff or to anyone else. The *Holliday* court expressed its concern that, "if we hold that a railroad employee demonstrating some possible negligence with psychological consequences will always present a jury question in a FELA action, the most attenuated claims could be advanced." 914 F.2d at 427.

The following year, in *Outten v. National Railroad Passenger Corporation, supra* the Third Circuit was faced with a claim brought by a railroad tamper operator who allegedly suffered emotional injuries after a passenger train was involved in a collision a mile from where he was working. Though the plaintiff did not witness the collision, was not injured in the collision and did not see the resulting injuries to passengers, none of whom was related to him, he claimed to have feared for his life. Affirming summary judgment in favor of the railroad, the Third Circuit cited its previous opinion in *Holliday* as making clear the policy reasons warranting a cautious approach in enlarging recovery for emotional injuries under the FELA, *to wit*, the need to prevent fraudulent claims, "incalculable and potentially unlimited damages" and a "flood of litigation." 928 F.2d at 77. Declining to "fashion a new rule for FELA cases so that a railroad employee can recover for purely emotional injuries provided that he or she reasonably feared personal physical injury," 928 F.2d at 79, or any other "litmus test for FELA claims based on negligent infliction of emotional distress," *id.*, the Third Circuit refused to recognize the plaintiff's claim because it could find "no solid basis" in common law to support it. *Id.*

As the Third Circuit made clear in *Gottshall*, its decisions in *Holliday* and *Outten* were based upon its recognition of the "strong policy reasons preclud[ing] finding liability for 'every possible distressful happening to which a railroad worker is exposed.' " (A-57)(quoting *Outten*, 928 F.2d at 79). As explained in *Gottshall*:

> This policy simply echoes the belief that frivolous claims for trivial emotional disturbances and bruised feelings that are ordinary and expected as part of daily life, such as stress from the ordinary conditions of the workplace, are not cognizable. *To this end, the proper limits on liability are those fixed by generally applicable principles of tort law.*

(A-57) (emphasis added).

Applying the tort law principles referred to by the *Gottshall* Court, other courts have routinely dismissed claims of emotional distress brought pursuant to the FELA. In *Robert v. Consolidated Rail Corporation, supra*, the First Circuit affirmed summary judgment against a plaintiff claiming he had suffered an off-the-job heart attack as a result of on-the-job harassment. The basis of the court's decision was that the undisputed factual record "fail[ed] to establish an essential element of negligence," *to wit*, reasonable foreseeability. 832 F.2d at 5 (emphasis omitted). Taking guidance from this Court, the First Circuit held that, "the essential ingredient of FELA negligence is the reasonable foreseeability of harm to plaintiff." *Id.*, *citing Harrison v. Missouri Pacific Railroad Co.*, 372 U.S. 248 (1963). In the case before it, the First Circuit found no basis for finding that the defendant either knew or should have known of the possibility that its conduct toward the plaintiff would cause him to suffer a heart attack. The plaintiff had not suffered any symptoms before the actual heart attack and had never complained to the defendant about the alleged harassment or that it caused him stress. *See also Stoklosa v. Consolidated Rail Corporation*, 864 F.2d 425 (6th Cir. 1988) (affirming summary judgment where it was not reasonably foreseeable that legitimate disciplinary action could result in the extreme reaction asserted by the plaintiff); *Plaisance v. Texaco, Inc.*, 966 F.2d 166 (5th Cir. 1992) (rehearing en banc) (court dismissed plaintiff's claim on the grounds that plaintiff's injuries were not reasonably foreseeable).

In *Adams v. CSX Transportation, Inc.*, 899 F.2d 536 (6th Cir. 1990), the plaintiff claimed to have suffered an emotional breakdown after being harassed by an abusive supervisor during a time period in which plaintiff already was under stress as a result of an acrimonious divorce and a bankruptcy proceeding. Affirming the trial judge's denial of plaintiff's claim, the Sixth Circuit found the claim to be "fatally flawed" because plaintiff failed to establish either a breach of the employer's duty to provide an emotionally safe workplace or that the injuries flowing from defendant's actions were foreseeable. 899 F.2d at 539, *relying on, inter alia, Robert v. Consolidated Rail Corporation*, 832 F.2d 3, 6 (1st Cir. 1987) (FELA plaintiffs are required to "prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation"). On the issue of foreseeability, the court noted that the railroad could not have foreseen plaintiff's emotional reaction to his supervisor's conduct where the plaintiff actually selected a job which increased his exposure to the supervisor and had never complained about the supervisor to the railroad. *Id.*

In *Moody v. Maine Central Railroad Company*, 823 F.2d 693 (1st Cir. 1987), the plaintiff claimed to have suffered fatigue, depression and angina as a result of harassment in the form of denying his admission into an engineer training program, assigning him to undesirable locations and denying him qualification to work trains on certain runs. Relying on *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986) (summary judgment mandated against party unable to establish an essential element as to which the party bears the burden of proof), the First Circuit found no competent evidence on the record establishing causation between plaintiff's injuries and the claimed harassment, and affirmed summary judgment for the railroad.

II. IN CONSTRUING THE FELA IN *GOTTSHALL*, THE THIRD CIRCUIT PROPERLY ADHERED TO THE *BUELL* DECISION AND BASED ITS DECISION ON AN EXACTING SCRUTINY OF THE CIRCUMSTANCES INVOLVED AND COMMON LAW DEVELOPMENTS.

As discussed above, this Court in *Buell* declined to impose a bright-line rule or test by which to measure emotional distress cases brought under the FELA. Instead, the *Buell* decision left it to the courts to weigh such claims on a case-by-case basis based upon an exacting scrutiny of the facts and with a view to common law developments. In reaching its decision in *Gottshall*, the Third Circuit took the *Buell* pronouncements to heart.

The Third Circuit began its decision in *Gottshall* by reviewing in detail the circumstances surrounding Gottshall's emotional collapse, including the death of Gottshall's co-worker and friend, Richard Johns, the extreme weather conditions and relentless work pace that caused Johns' death, Gottshall's exposure to those same weather and working conditions both before and after Johns' death, Conrail's own cavalier reaction to Johns' death, and Gottshall's involvement in Johns' death. (A-2 through A-6). Then, citing *Buell*, (A-8, 9), the court of appeals undertook a review of state common law relating to emotional distress claims, discussing the minority "physical impact" rule, the "zone of danger" and "physical manifestation rules" followed by a majority of the state courts, and the "bystander rule" followed in many other jurisdictions. (A-9 through A-11). The court of appeals noted that these tests are "as different as they are arbitrary" and pointed out that, though the tests were developed to "screen causes of action and send only the meritorious ones to juries," their unfortunate by-product was to preclude recovery for many meritorious claims. (A-11).

After its review of state common law relating to emotional injury claims, the court of appeals surveyed FELA emotional distress decisions by the other circuit courts, (A-12 through A-21), and then discussed its own post-*Buell* decisions. (A-22 through A-24). The Third Circuit explained its decisions in *Holliday* and *Outten* as reflecting its refusal either to construct its own litmus test or to designate any particular state common law test as *the* test in the circuit, (A-22, 23), stating that, "[b]ecause claims for negligent infliction of emotional distress are so fact-dependent, we declined to make broad pronouncements that could restrict future meritorious claims." (A-22).

Recognizing a tension between the fear of fraudulent and frivolous claims underlying existing common law emotional injury tests and the FELA's own liberal policy in favor of recovery, the court of appeals charged itself with reconciling that tension by, "discerning the trends and developments in common law and then gauging them according to the policy underlying FELA, for FELA is at issue here and creates the cause of action." (A-24).

The Third Circuit then discussed Congress's fashioning of the Act in general rather than specific terms in order to empower the courts to fashion remedies in a manner analogous to the development of common law, along with this Court's recognition of congressional intent to create a dynamic remedy which would be developed and enlarged to meet changing conditions. (A-25)(citing *Kernan v. American Dredging Co.*, 355 U.S. 426, 431-33 (1958)). The court of appeals also noted FELA's well-established departures from common law, including the Act's eradication of many traditional common law impediments to recovery such as contributory negligence and assumption of risk defenses and its relaxation of the causation requirement. (A-26 through A-30)(citing, *inter alia*, *Atchison, Topeka and Santa Fe Railway Co. v. Buell*; *Kernan v. American Dredging Co.*; *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326 (1958); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957); and *Urie v. Thompson*, 337 U.S. 163 (1949)). Recognizing that "FELA liability and common law liability are thus different," the court of appeals reached the obvious, "inexorable conclusion" that, "[s]tate law tests are not the *sine qua non* for determining whether plaintiff has a cognizable FELA claim and doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims." (A-30).[7]

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[7] Citing *Teague v. National Railroad Passenger Corporation*, 708 F. Supp. 1344, 1348 n.5 (D. Mass. 1989), the court of appeals pointed out that federal court reliance on state court tests in evaluating FELA emotional distress claims could result in, "the federal courts in the fifty states producing as many as fifty versions of what should be unified federal law." (A-30).

Reviewing in detail the anti-fraud policy underlying the state court tests (A-31 through A-34), the court of appeals concluded that the best way to enforce that policy is through an active scrutiny of the facts (A-35). The court of appeals then proceeded to weigh the circumstances of Gottshall's claim, finding those circumstances to satisfy the "physical manifestation" test (A-42), the "active participation" rule (A-40) and the principles underlying the "bystander theory." (A-36 through A-40). Having so found, the court of appeals held that Gottshall had "sufficiently shown that his injuries are genuine and severe to create a genuine issue for the jury to decide." (A-44).

Because Gottshall had passed this "threshold burden," the court of appeals proceeded to evaluate his claim against the FELA's requirements of breach of duty, injury and causation. Relying on this Court's opinion in *Inman v. Baltimore & Ohio Railroad Co.*, 361 U.S. 138, 140 (1959), the court of appeals held that negligence in the context of emotional injuries requires, as it does with physical harm, "a foreseeable risk of injury and conduct unreasonable in proportion to the danger." (A-44). Applying that standard to the facts before it, the court of appeals concluded that a reasonable employer would have foreseen the risks associated with the adverse weather conditions, the age and physical condition of the men and petitioner's forcing the men to work at an accelerated pace without adequate breaks. (A-49). Moreover, because several of the men had actually complained to their supervisor about the conditions, there was evidence that petitioner had actual knowledge of the danger. (A-49, 50).

The court of appeals found a genuine issue as to whether Gottshall sustained cognizable *injury*. (A-55). As a result of his trauma, Gottshall exhibited objective, physical symptoms and had to be institutionalized for three weeks. Three doctors diagnosed Gottshall as suffering from severe post-traumatic stress syndrome. Finally, the court of appeals found sufficient evidence to create an issue whether petitioner's negligence "played any part, however small," in causing that injury. (A-55) (quoting *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. at 508).

In concluding its opinion, the Third Circuit in *Gottshall* expressly recognized that, "even under the liberal recovery policy under FELA, the employer is not the insurer of the worker's safety" (A-56), and agreed that strong policy reasons warrant against imposing liability for " 'every possible distressful happening to which a railroad worker is exposed.' " (A-57) (quoting *Outten*, 928 F.2d at 79). However, the court of appeals concluded that the proper limits on liability in the context of emotional injury claims are those fixed by the general tort law principles of duty, foreseeability and causation. Though reiterating its own previous recognition of the potential for "incalculable and potentially unlimited damages, floods of litigation, and fraud," the court of appeals cautioned that, "these concerns cannot become the incantations by which railway attorneys make all plaintiff's claims disappear." (A-59).[8]

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[8] The court noted that in the five plus years since *Buell*, the courts of appeals have reported a total of eighteen cases involving emotional distress claims under the FELA. (A-62). As the court of appeals noted, this is hardly a "flood" of litigation. *Id.*

Finally, the court of appeals took pains to "spell out" that it was not holding that a cause of action will arise whenever a railroad makes its men work in hot weather, or pushes them to perform hard labor, or whenever a railroad worker witnesses an injury or death while on duty. (A-63). Rather, the court made clear that its opinion was based on "the totality of these extreme facts." (A-64).

III. THE GOTTSHALL CASE TURNS ON ITS PARTICULAR FACTS AND THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING CERTIORARI.

This Court has consistently held that it does not "grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Because the court of appeals expressly based its decision in *Gottshall* on a scrutiny of the specific facts before it, granting certiorari here would violate that rule. Additionally, due to the narrow and specific holding of the court of appeals, including its express refusal to adopt any rules of law, the decision in *Gottshall* is of importance solely to the litigants, and there are otherwise no special or important reasons warranting the exercise of this Court's discretionary power of review.

◆

CONCLUSION

For the foregoing reasons, respondent James E. Gottshall respectfully requests this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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No. 92-1956

In The

Supreme Court of the United States

October Term, 1993

◆

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents.

◆

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

◆

RESPONDENT ALAN CARLISLE'S BRIEF IN OPPOSITION

◆

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QUESTION PRESENTED

1. Whether the opinion of the Third Circuit Court of Appeals is consistent with established precedent in holding that a railroad worker has suffered a compensable injury when his workplace was maintained in an unsafe condition which resulted in foreseeable adverse effects on physical health?

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To The United States Court Of Appeals
For The Third Circuit

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RESPONDENT ALAN CARLISLE'S BRIEF IN OPPOSITION

◆

Respondent Alan Carlisle respectfully submits that this Court should deny the Petition for Writ of Certiorari. The Petitioner seeks review of the opinion issued in this case by the United States Court of Appeals for the Third Circuit. (See Appendix, A-73).

◆

STATEMENT

Respondent, Alan Carlisle, filed this suit under the Federal Employers Liability Act, 45 U.S.C. Sec. 51, *et seq.*

("FELA"), against Consolidated Rail Corporation ("Conrail"), his former employer. Plaintiff claimed that Conrail breached its non-delegable duty to provide him with a safe place to work by exposing him to unreasonably dangerous conditions with foreseeable hazards to his health. The jury returned a verdict in favor of the plaintiff in the amount of $386,500.00. Conrail moved for judgment notwithstanding the verdict. The trial court denied that Motion in a written memorandum and order on March 25, 1992 (Appendix, A-106). An appeal to the United States Court of Appeals for the Third Circuit followed and was decided in Respondents favor on March 29, 1993. (Appendix, A-73).

After starting as a train dispatcher for Conrail in 1976, respondent, Alan Carlisle, moved up to supervising other train dispatchers and by 1981, was responsible for all the train movements in and out of Washington, D.C., Baltimore, Wilmington and Philadelphia. Some of these trains carried passengers, but most carried freight. A large portion of that freight was hazardous material. From 1984 and 1987, Conrail consolidated jobs and reduced its work force, forcing the dispatchers and respondent, Alan Carlisle, their supervisor, to make more decisions, more quickly and with less data.

Before the tower operators were eliminated by Conrail, they had served as the "eyes and ears" of the train dispatchers, since the dispatchers had no visual way to monitor the trains from the control center. The tower operators were analogous to forward observers in the field; they would see where a train was on track and send the information back to the dispatchers. In order to communicate this information among the dispatchers, Mr. Carlisle would shout it out to whoever needed it, amidst telephones ringing and radios transmitting and receiving. Respondent had to hold all this vital information in his memory, and make split second decisions that affected the safety of each train, its passengers, crew, freight and surrounding environs.

In 1988, Mr. Carlisle's already extensive job responsibilities shifted and increased. He was transferred to the South Philadelphia operation in May of 1988 where he kept many of the train dispatching and supervisory responsibilities of his previous position. In addition, Conrail reduced the number of people working each shift, and Mr. Carlisle was given the responsibilities from what had previously been handled by other workers. He had to oversee several train yards in Philadelphia, enforce compliance with safety rules and perform the function of a troubleshooter. As a troubleshooter he had to go to the site of a train that was stopped for some reason, discover and remedy the problem. He requested police protection many times, since the areas in which he worked were often deserted trainyards and isolated crime-ridden areas, but his employer refused him.

Beginning in May of 1988, Conrail required respondent to work 15 hour days, from 6 to 13 consecutive days at a time. In one 2-week period, he worked in excess of 225 hours. During his time at work, Mr. Carlisle was prohibited from taking any breaks for lunch or rest, and was verbally abused at work and at home by his supervisor who habitually called him at home in the middle of the night. As a train dispatcher, Mr. Carlisle was under pressure to achieve on-time performance and he became concerned when Conrail instructed him to ignore safety concerns, such as poor maintenance or malfunctioning equipment, which would have caused delay.

As the numbers of hours and consecutive days lengthened, respondent experienced physical symptoms. He felt severe fatigue and headaches that would last all day. He lost his appetite and lost weight – from 15 to 20 lbs. – as the court observed "a significant amount for the not-so-hefty man the court observed at trial." (Trial Court Opinion, Appendix A-129). He suffered severe insomnia and he used alcohol to cut his internal stress and sleep. When he did fall asleep, his wife would often find him sleepwalking once with a lighted cigarette in his hand. Plaintiff fell into a major depression and with it came a decrease in his awareness of what was going on around him at home and at work. He feared that he was going to cause some serious injury to himself or others.

Mr. Carlisle's treating psychiatrist, Dr. Real, and internationally known stress expert, Dr. Rosch, unequivocally drew the causation link between Mr. Carlisle's working conditions and an adjustment disorder which evolved into major depression. In the opinion of both, respondent's railroad working conditions caused his severe mental and physical health problems. Even petitioner's expert psychiatrist, Dr. Kool, agreed, testifying that respondent suffered from an adjustment disorder, caused, at least in part, by his work.

The unsafe nature of respondent's work place and the foreseeability of injury to him were well known to petitioner. Mr. Carlisle testified that he complained to his supervisor about the stress of his long hours and overwhelming job responsibility and resulting physical symptoms. Respondent's wife also testified that in the months before his breakdown she herself complained to the respondent's immediate railroad supervisors. The testimony of six other Conrail train dispatchers who had worked previously in respondent's same office indicated that they too had each suffered various medical illnesses ranging from heart attacks to nervous breakdowns, after being exposed to virtually the same working conditions as Mr. Carlisle. These dispatchers testified that they told Conrail that unsafe working conditions and stress from the job had caused each of their illnesses. In addition, Conrail was aware of two government reports concerning the dangers of respondent's work place. First, a 1974 FRA report found that the stress of the job of the train dispatching caused negative medical consequences on employees. It noted specific sources of stress such as the dependence on memory, inadequate staffing, conflict between management's need for production and safety and the pressure for perfect performance since a mistake could result in substantial injury.

The second report was a 1987 Federal Railway Administration (FRA) Safety Assessment of Conrail and its Philadelphia office where Mr. Carlisle worked. In particular, the report found that the dispatching workload was "excessive to the point that there was an appearance of having made decisions which were not well thought out." The report notes its concerns that dispatchers are required to perform several other functions that are unrelated to the safe movement of trains and are forced to work in a necessarily disruptive environment, with phones ringing, radios blaring, and dispatchers shouting, necessary because there is no communication system between dispatching desks. The assessment found insufficient staff to provide relief for vacations, personal emergencies or sickness. Instead of conflict between production and safety, the report noted that "to many middle and upper-middle managers value production over safety" and "failed to translate the organizational safety committment into effective safety programs."

Despite explicit recommendations to update the equipment used in the dispatcher's job, to reduce the workload per dispatcher, and to ensure the availability of adequate dispatching personnel no changes in these areas were made.

As the trial court noted in its opinion,

> "From the evidence presented by the plaintiff, the jury could have concluded that the 1974 report put Conrail on notice of the stressfulness of the train dispatcher's job, and of the medical problems caused by that stress. The 1987 report put Conrail specifically on notice that particular problems existed in the dispatcher's working conditions, creating a hazardous situation for the people who work there. In addition, after Conrail received complaints by at least six other train dispatchers that the same conditions outlined in the 1987 report had caused their emotional and medical illnesses, the jury could have concluded that it was foreseeable to Conrail that working Mr. Carlisle for up to 13 consecutive days, 15 hours a day under those stressfilled working conditions, would result in injury to Mr. Carlisle.

> 'The plaintiff's evidence that Conrail negligently breached its duty to provide a safe workplace was legally sufficient to go to the jury. He presented evidence intended to show that Conrail created hazardous working conditions, knew of their potentially harmful effects on the plaintiff, and did nothing to alleviate them. Mr. Carlisle presented evidence that it was those stressful working conditions that caused his injury.' " (Appendix, A-134).

◆

REASONS FOR DENYING THE PETITION

The opinion of the Third Circuit Court of Appeals is consistent with established precedent in holding that a railroad worker has suffered a compensable injury when his workplace was maintained in an unsafe condition which resulted in forseeable adverse effects on physical health.

The United States Court of Appeals for the Third circuit decided a narrow, fact sensitive case in an opinion consistent with established precedent. Petitioner asserts that this decision is out of step with established common law principals and that there is a conflict among the Circuits in this area. Respondent answers that Petitioner has unfairly characterized the case as one in which damages were awarded for a wholly emotional injury, rather than one in which compensation was given for physical manifestations of long term exposure to a work place that, as early as 1974, was found unduly hazardous.

Petitioner's mis-characterization is central to their argument. By branding Mr. Carlisle's case as one in which the injury was wholly emotional, they are then able to survey the Circuits and find a conflict and are able to assert that generally accepted common law principles would deny recovery. Moreover, they attempt to place this matter in the category of cases left undecided in *Atchison, Topeka and Santa Fe Ry. v. Buell,* 480 U.S. 557 (1987) and then ask this Court to resolve this issue.

The Third Circuit opinion in this case specifically indicates that this analytical framework is inappropriate:

> "In *Buell,* the Supreme Court declined to decide whether *wholly emotional injuries* arising from work conditions were compensable under the F.E.L.A. . . . " (Appendix, A-80, emphasis added).
>
> "The injury here to Carlisle was emotional, accompanied by obvious physical manifestations. *We do not face and do not decide* the issue of whether *purely emotional injury,* caused by extended exposure to stressful, dangerous working conditions would be compensable under the F.E.L.A." (Appendix, A-88, footnote 11, emphasis added).

In short, if this Court desires to establish precedent in the area of "wholly emotional injuries" under the FELA, answer the questions left open in *Buell* and resolve any conflict among the Circuits in the area, the present case is not an appropriate vehicle.

Assuming that Mr. Carlisle's claim was properly categorized for analytical purposes, the Third Circuit opinion is consistent with established FELA precedent and common law principles. Any discussion in this area must begin with the Act itself. Section I of the FELA 45 U.S.C. 51 provides "every common carrier by railroad . . . shall be liable in damages to (employees) . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . . " Thus the FELA views the railroad "as a unitary enterprise, its economic resources obligated to bear the burden of *all injuries* befalling those engaged in the enterprise arising out of the fault of any member engaged in the common endeavor." *Sinkler v. Missouri Pacific Railroad Co.,* 356 U.S. 326, 330, 78 S.Ct. 758, 762 (1958) (emphasis added).

The Act does not propose to define negligence, but rather leaves that task to the common law as announced by the federal courts. *Urie v. Thompson,* 337 U.S. 163, 69 S.Ct. 1018 (1949). In deciding questions of negligence, the Courts have uniformly recognized that a railway is under a non-delegable duty to provide its employees with a reasonably safe place to work. *Nivens v. St. Louis S.W. Ry.,* 425 F.2d 114 (5th Cir. 1970). As a corollary to this duty to maintain safe working conditions, the carrier is required to provide its employee with sufficient assistance in the performance of the work assigned to him. *Blair v. Baltimore & O.R.R.,* 323 U.S. 600, 65 S.Ct. 545 (1945). Furthermore, the act does not limit recovery to certain types of injury while excluding others, nor does it limit recovery to damages sustained in a single incident or accident in the work place. In *Urie v. Thompson, supra,* the Supreme Court noted:

> "We recognize, of course, that when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting

> from accidents on interstate railroads. Obviously, these were the major causes of injury and death resulting from railroad operations, but accidental injuries were not the only ones likely to occur. And nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage *any injury* resulting in "whole or in part from the negligence" of the carrier. If such an Act can be found, it must be read into the Act by sheer inference . . .
>
> On its face, *every injury* suffered by an employee while employed by reason of the carriers negligence was made compensable. The wording was not restrictive as to employees covered, the cause of the injury, except that it must constitute negligence attributable to the carrier; *or the particular kind of injury resulting.* To read into this all inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required or *the particular sorts of harm inflicted,* would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established source of liberal construction of the Act followed by this Court."

(337 U.S. at 181-82, 69 S.Ct. at 1030) (emphasis added)

As noted above, federal courts are required to apply common law principles in their development of FELA jurisprudence. In so doing, they often search for the majority common law rule as it has emerged from state court decisions. A particularly illuminating example of this is *Teague v. National Railroad Passengers Corp.*, 708 F.Supp. 1344 (D.Mass. 1989). In that matter, Petitioner claimed that his employer had engaged in a course of

conduct that harassed and humiliated him. This stressful condition of employment led him to develop ulcers, duodenitis and chest pain. To put it differently, the employee did not allege a single accident or incident as the precipitating cause but merely alleged a medically diagnosed condition directly attributable to the emotional stress under which he worked. That is precisely the position of the Respondent in the instant case. Given this fact pattern, the *Teague* Court concluded:

> "The Court holds that a review of developments in the state common law, see S. Plotkin, The Evolution of Tort Liability for Psychic Injuries: A Proposal to Protect Relational Interests (1986) (unpublished thesis on file at the University of Virginia Law School), as well as developments in Supreme Court FELA jurisprudence reveal a sufficient claim has been made out. Teague claims that the insults and harassment of his supervisors at Amtrak caused him mental anguish as well as physical ailments. *As the Supreme Court has observed, 'While the traditional rule was that a plaintiff could not recover from mental injuries unconnected with actual or threatened impact, the majority of jurisdictions now appear to have abandoned that rule.' Buell,* 480 U.S. at 569, n. 20., 107 S.Ct. at 1418 n.20. Indeed, the present majority rule allows recovery for 'mental distress [when] certified by some physical injury, *illness* or other objective physical manifestation'." Prosser and Keeton on the Law of Torts, Sec. 54 at 364 (5th Ed. 1984); see e.g., *Payton v. Abbott Labs,* 386 Mass. 540, 437 NE 2d. 171 (1982); Restatement (Second) of Torts, Secs. 436, 436A and Comments. (Emphasis added)

As noted above, both the United States Supreme Court in *Buell* and Professor Keeton have concluded that a single precipitating event causing an immediate physical injury is not a condition precedent to the tort of negligent infliction of emotional distress. Particularly instructive is Professor Keeton's analysis:

> "Starting with an early Irish decision, the great majority of courts have now repudiated the requirement of impact, regarding as sufficient the requirement that the mental illness be certified by some physical injury, illness or other objective physical manifestation. (Prosser and Keeton, supra., p. 364).

In support of this analysis, Professor Keeton refers to *Payton v. Abbott Labs*, 386 Mass 540, 437 NE 2d. 171 (1982) which is also the standard adopted in *Teague* as representative of the majority common law rule. In that case, females whose mothers had ingested a cancer-causing drug during pregnancy attempted to recover from their own fear of getting cancer, although none of them had the disease or other symptomology at the time of the suit. The Court in denying their claim noted:

> "The Restatement (Second) of Torts Sec. 436A (1965) sets forth what is still the rule adhered to by the majority of American courts: 'If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another and it results in such emotional damage alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.' The cases generally hold that physical harm is required but (in accordance with the Restatement (Second) of Torts Sec. 436(2)(1965)) the harm need not be caused by impact for trauma; *physical harm resulting from emotional stress is sufficient.*"

(at 552) (emphasis added)

Given the above, a search for a concise statement of the majority rule is in order. Both the *Teague* court and Professor Keeton point to *Payton v. Abbott Labs, supra*, as containing such a statement. The Court held:

> "We therefore conclude on the basis of the preceding analysis, that in order for any of the plaintiffs to recover for negligently inflicted emotional distress, she must allege and prove that she suffered physical harm as a result of the conduct which caused the emotional distress. We answer further that a plaintiff's physical harm must either cause or be caused by the emotional distress alleged and that the physical harm must be manifested by objective symptomology and substantiated by expert medical testimony. Finally, the emotional stress for which compensation is sought must be reasonably foreseeable; unless a plaintiff proves that the defendant knew or should have known of special factors affecting that plaintiff's response to the circumstances of the case the plaintiff can recover only for that degree of emotional distress which a reasonable person that normally constituted would have experienced under those circumstances. Whether the emotional distress which a plaintiff has alleged to have experienced is reasonable is to be determined by the finder of the fact.

(at 556-557)

With the above state rule in mind, it is now appropriate to look for FELA cases similar to Respondent's.

In *McMillan v. Western Pacific Railroad Company,* 54 Cal. 2d 841, 9 Cal. Rptr. 361, 357 P.2d. 449 (1960), the Court evaluated an FELA claim pressed by a train dispatcher who alleged that the railroad had negligently subjected him to working conditions "of unusual responsibility, stress and tension in that he was required to operate a system of central traffic control of defendant's railroad, which system involved multitudinous and complex and mechanical factors and mental decisions, extreme responsibility, constant but shifting attention and numerous clerical functions which imposed an unusual stress and burden upon plaintiff's physical and nervous systems which caused plaintiff to suffer a severe mental collapse . . . " (at 357 P.2d. 449). In short, the cause of action asserted in this case is virtually identical to those of the respondent in the present matter.

In holding that the plaintiff had stated a cause of action under the FELA, the Court analyzed *Urie v. Thompson, supra,* in detail. They noted that the "injury" in *Urie* was silicosis, an occupational disease acquired during long term exposure to the work place. It was thus clear that the term "injury" as used in the FELA context was not limited to the trauma associated with a sudden accident, but rather was a term that included adverse effects on the employee's health.

Based on the reasoning, the court had no difficult in holding that a train dispatcher, who suffered a nervous breakdown as a result of the conditions under which he worked, had stated a claim under the FELA.

In *Yawn v. Southern Ry. Co.,* 591 F.2d 312 (5th Cir. 1979), seven clerical workers brought an action under the FELA alleging that the railroad had negligently failed to provide them with adequate help and adequate time within which to do their jobs, thereby causing them to suffer "physical pain, mental anguish and gastrointestinal disturbances" (591 F.2d at 314). While not passing on the issue of the gravity of the plaintiffs' injuries, the Court noted that failure of the employer to provide sufficient manpower for the job at hand, was negligence sufficient to impose liability under the act.

In *Welby v. Consolidated Rail Corp.,* 671 F.Supp. 1015 (M.D.Pa. 1987) an employee claimed that his myocardial infraction resulted from the excessive hours which the railroad required him to work. Again, the Court held that this represented a valid claim of injury stemming from an unsafe work place and was thus within the scope of the FELA.

In *Amendola v. Kansas City Southern Railway Company,* 699 F.Supp. 1401 (W.D.Mo. 1988), the court evaluated a claim that was clearly "wholely emotional," i.e. workers exposed to asbestos sought recovery for their fears of developing cancer in the future. In denying this claim, the court concluded a review of the development of FELA and emotional injury law that is particularly instructive in the instant case:

> "An important threshold issue to be addressed is whether the FELA even covers the tort of negligent infliction of emotional distress. In answering this question, the court must glean guidance from common law developments. *Buell,* 107 S.Ct. at 1417. This court finds that the tort of negligent infliction of emotional distress is covered by the FELA because it is clear that a

> majority of states now recognize the tort . . . Furthermore, several federal courts have recently found that a claim for the negligent infliction of emotional distress is cognizable under the FELA. See *Taylor v. Burlington N.R.R.*, 787 F.2d. 1309 (9th Cir. 1986); *Ballard v. Central Vermont Ry.*, 565 F.2d 193 (1st Cir. 1977); *Gillman v. Burlington Northern R.Co.*, 673 F.Supp. 913 (N.D. Ill. 1987); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135 (S.D.N.Y. 1987). This trend is consistent with the interpretation of the FELA as 'broad remedial statute' requiring a 'Standard of liberal construction in order to accomplish [Congress] objectives.' "

(699 F.Supp. at 1408)

In short, the majority rule supports recovery for negligent infliction of emotional distress under the FELA

In 1929, the eminent jurist, Benjamin Cardoza, in his address to the New York Academy of Medicine prophetically stated:

> "We lawyers are becoming increasingly aware that the difficulty in solving legal problems has little to do with discovering what the law is; but has everything to do with discovering what the *facts* are.
>
> Men of science, show us in the law what the facts are and the law will burst forth from its seed and turn its branches to the light." (Emphasis added)

In *Urie v. Thompson, supra,* medical science acknowledged a foreseeable link between a railroad worker's exposure to silicia dust and silicosis prompting the U.S. Surpeme Court to recognize the compensability of a railroader's silicosis under the FELA.

In the instant case, expert medical science, specifically, medical experts for Mr. Carlisle, i.e. Dr. Rosch and Dr. Real, and for the railroad, i.e. Dr. Kool, acknowledged a forseeable link between the emotional injury with physical manifestations of Mr. Carlisle and the unsafe conditions of his work place.

Medical science through the medical experts in this case demonstrated to the trial court and jury what the facts were and the trial court and the Third Circuit permitted the law to "burst forth from its seed and turn its branches to the light."

◆

CONCLUSION

While this Court may desire to resolve the issue of recovery for "wholly emotional injury" under the FELA, that, as the Third Circuit stated, is not the issue in the present case. The holding of both the trial and appellate courts in this matter are consistent with established precedent and represent an appropriate analysis of a narrow, fact sensitive case.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

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DESIGNATION OF CORPORATE RELATIONSHIPS

The Designation of Corporate Relationships set forth at pages ii-iii of petitioner's petition for a writ of certiorari is incorporated by reference herein. In addition to the companies named in its petition for a writ of certiorari, Consolidated Rail Corporation has an ownership interest in TTX Corporation.

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No. 92-1956

In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

The briefs in opposition to Consolidated Rail Corporation's ("Conrail") petition for a writ of certiorari are more telling for what they do not say than for what they do say. Respondents James E. Gottshall ("Gottshall") and Alan Carlisle ("Carlisle") completely ignore the profound conflicts among the circuits – conflicts that are well-documented in Conrail's petition for a writ of certiorari – concerning the legal standards to be applied in determining what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51. Instead, respondents devote their briefs almost exclusively to their arguments that the decisions of the Court of Appeals for the Third Circuit are correct on their facts.

Of course, Conrail disputes respondents' arguments on the merits and, should this Court grant the petition for a writ of certiorari, will address why the court of appeals' decisions in these cases are contrary both to the prevailing common law standards with regard to recovery for the negligent infliction of emotional distress and to the statutory purposes of the FELA. The significance of respondents' arguments at this juncture, however, is that they provide absolutely no reason why this Court should *not* grant Conrail's petition for a writ of certiorari.

ARGUMENT IN REPLY

I. RESPONDENTS DO NOT AND CANNOT DENY THAT THERE ARE PROFOUND CONFLICTS AMONG THE CIRCUITS CONCERNING THE LEGAL STANDARDS TO BE APPLIED IN DETERMINING WHAT CIRCUMSTANCES MAY GIVE RISE TO A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER THE FELA.

Respondents studiously avoid Conrail's fundamental point that review by this Court is necessary in view of the conflicting decisions of the courts of appeals concerning the legal standards to be applied in determining what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the FELA. The simple fact is that in the wake of this Court's decision in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557

(1987), the courts of appeal have adopted widely varying and irreconcilable approaches in evaluating such claims.[1]

Indeed, the Court of Appeals for the Third Circuit itself recognized that the decisions of the courts of appeals are in hopeless conflict and that the conflicts can be resolved only by further guidance from this Court. In *Gottshall*, the court of appeals noted the "open conflicts among the circuits" (A-20). In *Carlisle*, it noted the need for "clear direction from this circuit and, ultimately, the Supreme Court" (A-84). Similarly, two Justices of this Court have emphasized their belief that "a uniform rule should be announced by this Court on this important and recurring issue." *Ray v. Consolidated Rail Corp.*, 112 S. Ct. 914, 914 (1992) (White, J. dissenting, joined by Thomas, J.); *Carroll v. Consolidated Rail Corp.*, 112 S. Ct. 916, 916 (1992) (White, J., dissenting, joined by Thomas, J.).

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[1] Carlisle's claim that Conrail has misconstrued these cases by characterizing them as cases involving wholly emotional injury in order to create a conflict, *see* Carlisle Brief at 7, is misguided, to say the least. All of the cases cited in Conrail's petition, like these two cases, involved alleged physical manifestations of an emotional injury. *See, e.g., Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 704 (7th Cir. 1991) (mental and physical breakdown), *cert. denied*, 112 S. Ct. 914 (1992); *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 422 (3d Cir. 1990) (spastic colon, nightmares, tenesmus, involuntary rectal discharge, anxiety, and depression), *cert. denied*, 498 U.S. 1090 (1991); *Elliot v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1227 (4th Cir. 1990) (dizziness, weakness, faintness, stuttering, crying, inability to sleep, headaches, and extreme fatigue); *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 425 (6th Cir. 1988) (chest pain, fatigue, depression); *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 4 (1st Cir. 1987) (nonfatal heart attack); *Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366, 1367 (9th Cir. 1987) (fatal heart attack).

By not disputing the existence of these conflicts among the circuits on this important and recurring issue of federal law, respondents implicitly concede the point. On the basis of these undisputed, profound conflicts alone, this Court should grant Conrail's petition.

II. RESPONDENTS ARE INCORRECT THAT THE COURT OF APPEALS' DECISIONS ARE NARROW, FACT-SPECIFIC, AND UNWORTHY OF THIS COURT'S ATTENTION.

Respondents argue that this Court should deny Conrail's petition for a writ of certiorari because the holdings in these cases are narrow and fact-specific. *See* Gottshall Brief at 26; Carlisle Brief at 7.[2] This assertion both misreads the scope of the holdings and ignores the court of appeals' own express acknowledgment of the significance of these decisions. By rejecting the common law tests, which traditionally circumscribed the availability of damages for the negligent infliction of emotional distress, and by substituting a broad approach that focuses largely on foreseeability, these cases have far-ranging consequences. Indeed, the breadth of the court of appeals' holdings is evident from the very first application of the *Gottshall* holding – *Carlisle*.

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[2] Both respondents utilize an inordinate amount of space in their briefs reciting the particular facts of their cases, including, in Carlisle's case, a recitation of facts not recognized by either the district court or the court of appeals. *See* Gottshall Brief at 3-9; Carlisle Brief at 1-7. However, the profound legal holdings of the court of appeals are entirely independent of the particular facts of the cases.

Moreover, it is clear that the court of appeals was very aware that it was breaking new legal ground in *Gottshall* and *Carlisle*. In *Carlisle*, the court of appeals described its decision in *Gottshall* as *"for the first time* [upholding] recovery under the FELA for negligent infliction of emotional distress without proof of any physical impact" (A-84) (emphasis added). In *Carlisle*, the court of appeals *"for the first time* [upheld] a claim under the FELA for negligent infliction of emotional distress arising from work-related stress" (A-89) (emphasis added).

Accordingly, respondents' arguments that these cases involve narrow, fact-specific holdings are without merit and are belied by the express language of the court of appeals.

III. RESPONDENTS MISCONSTRUE THE CURRENT STATE OF THE COMMON LAW AND FELA JURISPRUDENCE.

In opposing Conrail's petition, respondents misstate the present state of the law governing recovery for the negligent infliction of emotional distress.

Respondents suggest that the common law of negligent infliction of emotional distress is moving towards an approach resembling that taken by the court of appeals in these cases. *See* Gottshall Brief at 14; Carlisle Brief at 13. Whatever the majority common law rule may be, *cf.* Conrail's Petition at 20 (setting out the three most commonly-used paradigms for recovery of damages for emotional distress), it is clear that it does not in any way resemble the amorphous analysis adopted in *Gottshall* and *Carlisle*. Indeed, those common law courts that have moved in the direction of the approach of *Gottshall* and *Carlisle* have found the approach utterly unworkable.

In this respect, the lesson of California, the first state to have adopted the bystander test as an exception to the less expansive zone of danger test, is instructive. In the years following *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), in which the Supreme Court of California first adopted a bystander test, the California courts struggled to define the precise parameters of the tort of negligent infliction of emotional distress, producing a body of law even more arbitrary and confusing than the "rigid tests" that respondents argue that the court of appeals was correct to abandon. In response to the confusion created by vaguely defined criteria for the recovery of damages for the infliction of emotional distress, the California Supreme Court finally concluded that establishing concrete limits of liability "is unavoidable if we are to establish meaningful rules for application by litigants and lower courts." *Thing v. La Chusa*, 48 Cal. 3d 644, 666, 771 P.2d 814, 828, 257 Cal. Rptr. 865, 879 (1989). As the court explained, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Id.* at 668, 771 P.2d at 830, 257 Cal. Rptr. at 881.

In addition, even Hawaii, the very jurisdiction that Gottshall identifies as having abandoned the traditional common law tests in favor of a *Gottshall*-like test of foreseeability, later retreated from that approach. A year after its decision in *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974) – the decision on which Gottshall relies – the Hawaii Supreme Court, in *Kelley v. Kokua Sales & Supply, Ltd*, 56 Haw. 204, 532 P.2d 673 (1975) – a decision that Gottshall does *not* cite – recognized that basing recovery for emotional damages solely on foreseeability is unworkable. Although the harm suffered by the plaintiff in *Kelley* was serious and foreseeable, the court concluded that the plaintiff was too far from the scene of the accident to be permitted to recover. It reasoned that "[w]ithout a reasonable and proper limitation of the scope of the duty of care owed by" defendants, defendants "would be confronted with an unmanageable, unbearable and totally unpredictable liability." *Id.* at 208, 472 P.2d at 676.

In addition to joining Gottshall's misconstruction of the common law, Carlisle misstates the law under the FELA. To support his contention that workplace stress claims are cognizable under the FELA, Carlisle relies on a 1960 California state FELA case; a 1979 Fifth Circuit case – a case of doubtful precedential value given the later Fifth Circuit cases cited in Conrail's Petition at 16-17; a 1987 Pennsylvania district court case; and a 1988 Missouri district court case. Carlisle Brief at 14-16. Whatever their precedential value, it is evident that these decisions are anomalous. Indeed, although utilizing varying legal analyses, most lower federal courts have concluded that work-related stress is *not* compensable under the FELA. *See, e.g., Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 425 (3d Cir. 1990); *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990); *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 426 (6th Cir. 1988); *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073, 1090 (E.D. Pa. 1989), *appeal* *dismissed*, 899 F.2d 1360 (3d Cir. 1990); *Smolsky v. Consolidated Rail Corp.*, 780 F. Supp. 283, 290 (E.D. Pa. 1991).

Finally, Gottshall suggests that this Court should deny Conrail's petition for a writ of certiorari because the approach of the court of appeals was consistent with this Court's pronouncements in *Buell*. *See* Gottshall Brief at 17. However, it is clear that the court of appeals in these cases stands alone in reading *Buell* to have endorsed a complete abandonment of the common law tests for the recovery of damages for the negligent infliction of emotional distress. This Court should grant Conrail's petition for a writ of certiorari because further direction from this Court is necessary to create a consistent method of legal analysis for claims brought under the FELA for the negligent infliction of emotional distress.

CONCLUSION

For the foregoing reasons and for the reasons set forth in its petition for a writ of certiorari, petitioner Consolidated Rail Corporation respectfully requests that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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DESIGNATION OF CORPORATE RELATIONSHIPS

The Designation of Corporate Relationships set forth at pages ii-iii of petitioner's petition for a writ of certiorari as supplemented by page i of petitioner's reply brief is currently accurate and is incorporated by reference herein.

No. 92-1956

In The

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CONSOLIDATED RAIL CORPORATION,
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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

In the short period of time that has passed since August 3, 1993, when Consolidated Rail Corporation ("Conrail") filed its reply brief in support of its joint petition for a writ of cetiorari in these two cases, the Court of Appeals for the Second Circuit has spoken for the first time with respect to the circumstances under which a cause of action for negligent infliction of emotional distress may be maintained pursuant to the Federal Employers' Liability Act ("FELA"). *See Puthe v. Exxon Shipping Co.*, No. 92-9291, 1993 U.S. App. LEXIS 20996 (2d Cir. Aug. 19, 1993). We submit this supplemental brief to call this Court's attention to this recent decision. The decision both supplements Conrail's argument at pages 11-19 of its petition that the courts of appeals are badly splintered with respect to the circumstances under which a plaintiff may recover for the negligent infliction of emotional distress pursuant to the FELA and demonstrates that even in the short period of time in which Conrail's petition has been pending before this Court, the courts of appeals have continued to struggle with the issues raised in these two cases.

Significantly, the Court of Appeals for the Second Circuit in *Puthe* did not adopt the expansive test formulated in these cases by the Court of Appeals for the Third Circuit that foreseeability is the only restraint on recovery for emotional distress pursuant to the FELA. *See* Conrail's Petition at 10-11. Instead, it rejected the approach of the courts of appeals for the fourth and sixth circuits that a plaintiff must demonstrate "outrageous conduct," *see Elliott v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1229 (4th Cir. 1990), or "unconscionable abuse," *see Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539-40 (6th Cir. 1990), to recover for the negligent infliction of emotional distress pursuant to the FELA, and declined to set any standard for the type of injury or misconduct necessary to present a claim pursuant to the FELA. It concluded that "whatever the standards for such a claim may be, a plaintiff cannot recover under any theory of negligence unless his injuries are foreseeable." *Puthe*, 1993 U.S. App. LEXIS at *11.

The Court of Appeals for the Second Circuit concluded that the defendant could not have foreseen that the plaintiff would suffer from emotional distress as a result of stresses (such as laboring under adverse weather

conditions, learning of the death of a fellow crewmember, and witnessing the injury of another fellow crewmember) caused by his job as an able-bodied seaman because the defendant had "no duty to keep [the plaintiff] safe from the rigors of a job as a seaman." *Puthe*, 1992 U.S. App. LEXIS at *12. This approach stands in stark contrast to that of the Court of Appeals for the Third Circuit which in these cases concluded that it was foreseeable that the ordinary stresses of plaintiffs' jobs as a railroad laborer and train dispatcher could cause emotional injury. *See* Conrail's Petition at 21.

CONCLUSION

For the foregoing reasons and for the reasons set forth in its petition for certiorari and reply brief, petitioner Consolidated Rail Corporation respectfully requests that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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CONSOLIDATED RAIL CORPORATION,

Petitioner,

vs.

JAMES E. GOTTSHALL and ALAN CARLISLE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR AMICI CURIAE NEW JERSEY TRANSIT RAIL OPERATIONS, INC. AND SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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No. 92-1956

In The

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,

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BRIEF FOR AMICI CURIAE NEW JERSEY TRANSIT RAIL OPERATIONS, INC. AND SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICI CURIAE

The *amici curiae* are public entities which provide interstate public rail transportation in New Jersey, New York and Pennsylvania. New Jersey Transit Rail Operations, Inc. operates commuter rail service throughout New Jersey and into New York City. The Southeastern Pennsylvania Transportation Authority

(SEPTA) operates similar service in Pennsylvania and into New Jersey. The *amici* have a significant and vital interest in the resolution of the issue in this case, specifically whether the Federal Employers' Liability Act (FELA), 45 U.S.C.A. § 51 *et seq.*, permits railroad employees to maintain an action for emotional injury due to stress created by general work conditions where there is no evidence of any physical impact or threat of physical impact. The decisions of the Court of Appeals for the Third Circuit in *Gottshall v. Consolidated Rail Corporation*, 988 F.2d 355 (3d Cir. 1993), and *Carlisle v. Consolidated Rail Corporation*, 990 F.2d 90 (3d Cir. 1993), represent a significant and dramatic departure from the principles that have heretofore governed FELA emotional injury actions in that Circuit and unquestionably represent a broadening of the circumstances when liability will be imposed under the Act.

The principles announced in these cases will undoubtedly open the door to the award of monetary judgments against the *amici* and other interstate carriers operating in the Third Circuit. For publicly run railroads like New Jersey Transit and SEPTA, this expansion of liability will necessarily divert limited resources from other vitally important needs of these transportation systems and potentially require a call for greater governmental subsidization, higher fares or service reductions.

SUMMARY OF ARGUMENT

Under the FELA, employees of every railroad may recover for injuries sustained due to the negligence of his or her employer. 45 U.S.C.A. § 51. In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), the Court refused to determine whether wholly emotional injuries arising from work conditions were compensable under the Act. The Court noted, however, that FELA jurisprudence "gleans guidance from common-law developments." *Id.* at 568. Following this decision, the courts of appeal have divided sharply on the standards that govern recovery for the negligent infliction of emotional distress. The consequence has been a series of conflicting opinions on a significant issue of federal law. On this important and recurring question, there is a compelling need for the Court to announce a uniform rule. *See Ray v. Consolidated Rail Corp.*, 112 S. Ct. 914 (1992) (White and Thomas, JJ., dissenting from the denial of *certiorari*).

The need for review by the Court is particularly acute because the Third Circuit has in these cases adopted the most extreme and expansive approach taken by the courts of appeal on this question. The Third Circuit determined that a cause of action for emotional distress would be cognizable under FELA "when it is reasonably foreseeable that extended exposure to dangerous and stressful working conditions will cause injury to the worker . . . ." *Carlisle, supra*, 990 F.2d at 97. This approach has absolutely no basis in the common law. The holding of the Third Circuit will substantially broaden the circumstances when employers will be liable under the Act.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE CIRCUITS ARE IN SHARP CONFLICT AND REQUIRE GUIDANCE ON THE ISSUE OF NEGLIGENT INFLICTION OF EMOTIONAL HARM UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court noted that recovery for emotional injury under the FELA should be guided by the common law and would require a fact-sensitive examination of "the nature of the injury and the character of the tortious activity." *Id.* at 568. The Circuits have responded to this invitation to develop an approach to FELA claims for emotional injury by creating sharply divergent rules of law. However, with the exception of the Third Circuit's recent decision in *Carlisle*, each Circuit looked to the common law for guidance and closely examined the employer's tortious activity when deciding the case.

Presently, recovery for emotional injury under the FELA depends on which Circuit suit is brought in; some plaintiffs' burdens are light and some are heavy. A railroad worker who brings a FELA suit for emotional injury in the Fourth Circuit must prove that the employer engaged in unconscionable or outrageous conduct. *Elliot v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1229 (4th Cir. 1990). Similarly, a FELA plaintiff in the Sixth Circuit must be the victim of "unconscionable abuse" to recover for emotional injuries. *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539-40 (6th Cir. 1990).

However, a railroad worker seeking recovery for emotional injury in a FELA suit in the Fifth Circuit must be in the "zone of danger" and fear for his or her own safety during a distressful incident. *Gaston v. Flowers Transp.*, 866 F.2d 816, 817 (5th Cir. 1989). If a worker is subjected to physical impact or the threat of physical impact during an incident, then recovery for emotional injury may be obtained in the Seventh Circuit. *Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 914 (1992).

Though conflicting, the respective principles espoused in each of these cases are solidly grounded in the common law. The Fourth and Sixth Circuits adopted the common law test involving outrageous conduct. *See Restatement (Second) of Torts* § 46(d) (1965). The Fifth and Seventh Circuits adopted the physical impact and the zone of danger tests, which are likewise based on the common law. *See Restatement (Second) of Torts* § 436A; *Dillon v. Legg*, 68 Cal. 2d 728, 441 F.2d 912, 69 Cal. Rptr. 72 (1968). In addition, each of these Circuits considered the conduct of the employer and the character of its tortious conduct, such as outrageous acts or the creation of a dangerous situation that culminated in a distressful incident.

However, the Third Circuit has severed all ties to the common law and abandoned any meaningful analysis of the character of the employer's tortious activity. The Third Circuit has ruled that there need be no incident that causes physical impact or the threat of physical impact; there need be no incident that could be characterized as outrageous or unconscionable; there need be no incident during which a plaintiff witnesses a distressful event. Indeed, there need be no incident at all. Rather, the Third Circuit has ruled that general work conditions that create stress can be the basis for liability for emotional injury under the FELA. *Carlisle, supra*, 990 F.2d at 97.

The "tortious acts" that gave rise to liability in *Carlisle* were: reducing the work force; requiring employees to work longer hours; and failing to upgrade railstock and switching equipment. *Id.* at 92. To the Third Circuit, "tortious activity" can therefore include business and management decisions that, in the aggregate, cause stress to certain workers.

Contrary to this Court's instruction to consider both "the nature of the injury and the character of the tortious activity," *Buell, supra*, 480 U.S. at 568, the Third Circuit omitted an analysis of the character of the employer's tortious activity and focused solely on the nature of the plaintiff's injury. The Third Circuit reasoned that as long as the plaintiff can prove that his emotional injury is genuine, the FELA provides a remedy. *Carlisle, supra*, 990 F.2d at 94. The Third Circuit rejected the common law standards that condition recovery for emotional injury on distressful incidents such as being threatened with physical impact or witnessing a relative suffer injury. *Id.* at 94-95. These common law standards were characterized as mere proxies for determining when a plaintiff suffers a genuine injury, rather than for determining when it is reasonably foreseeable that an employer's conduct would cause emotional injury. *See id.* at 94. By omitting meaningful analysis of the character of the employer's tortious activity, the Third Circuit has significantly expanded the circumstances when liability will be imposed under the FELA.

While the Circuits previously were in conflict regarding which common law test is best suited to define the bounds of recovery under the FELA, now they are in conflict regarding the very existence of such boundaries. This Court should grant certiorari to provide much-needed guidance in this turbulent and confused area of law.

CONCLUSION

For the reasons set forth above, *amici curiae* New Jersey Transit Rail Operations, Inc. and Southeastern Pennsylvania Transportation Authority respectfully request that this Court grant the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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No. 92-1956 (18)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

JOINT APPENDIX

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Petition for Certiorari Filed June 9, 1993
Certiorari Granted October 12, 1993

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The following opinions, decisions, judgments, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to Petitioner's printed Petition for a Writ of Certiorari:

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Gottshall v. Consolidated Rail Corporation

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Date	Event
April 26, 1989	Complaint. Jury trial demanded.
June 6, 1989	Defendant's Answer.
December 31, 1990	Defendant's Motion for Summary Judgment, Memorandum of Law, and Certificate of Service.
January 30, 1991	Plaintiff's Memorandum of Law in Opposition to Motion for Summary Judgment of Defendant with Appendix of Exhibits.
February 7, 1991	Defendant's Memorandum in Response to the Memorandum of Plaintiff in Opposition to Defendant's Motion for Summary Judgment.
February 12, 1991	Order setting oral argument on Defendant's Motion for Summary Judgment for 3/14/91 at 9:30 A.M. 2/13/91 entered and copies mailed.
February 15, 1991	Plaintiff's Reply to Defendant's Response to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.
April 17, 1991	Argument on Defendant's Motion for Summary Judgment.

Date	Event
October 1, 1991	Letter from John J. O'Brien, Jr., Esq., dated 4/19/91 re: letter memorandum concerning the Third Circuit's recent decision in *Outten v. National Railroad Passenger Corp.*, No. 90-1520.
October 1, 1991	Letter to Judge Ditter from D. Scott Morgan, Esq., dated 4/17/91 re: written comments on the *Outten* case.
October 1, 1991	Memorandum and Order that Defendant's Motion for Summary Judgment is Granted. Judgment is entered in favor of Defendant and against James E. Gottshall (signed by Judge J.W. Ditter Jr.). 10/2/91 entered and copies mailed.
October 1, 1991	Case closed.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Date	Event
October 29, 1991	Notice of Appeal filed by James E. Gottshall.
October 31, 1991	Civil case docketed.
December 10, 1991	Brief and Appendix on behalf of Appellant James E. Gottshall. Certificate of Service dated 12/10/91.
January 9, 1992	Brief on Behalf of Appellee Consolidated Rail. Certificate of Service dated 1/9/92.
May 7, 1992	Argued before Becker, Nygaard and Roth, Circuit Judges.
February 8, 1993	Opinion (Becker, Nygaard, Authoring Judge, and Roth, Circuit Judges) with a separate concurring and dissenting opinion by Judge Roth.
February 8, 1993	Judgment: Reversed and remanded to District Court. Costs taxed against appellee.
February 22, 1993	Petition by Appellee for rehearing in banc. Certificate of service dated 2/22/93.
March 11, 1993	Order (Sloviter, Chief Judge, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Authoring Judge, Alito, Roth and Lewis, Circuit Judges) denying petition for in banc rehearing by Appellee Consolidated Rail. Judges Greenberg and Hutchinson would grant rehearing in banc. Judge Roth would grant rehearing for the reasons set forth in her dissent.
March 19, 1993	Mandate issued. Record released.
May 20, 1993	Reported at 988 F.2d 355.
June 14, 1993	Notice from Supreme Court of United States advising of petition for writ of certiorari filed by Appellee Consolidated Rail on 6/9/93 at Supreme Court number 92-1956.
October 18, 1993	United States Supreme Court order dated 10/12/93 at Supreme Court number 92-1956, granting petition for writ of certiorari by Appellee Consolidated Rail in Court of Appeals number 91-1926.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES E. GOTTSHALL : CIVIL ACTION
vs. : NO. 89-3102
CONSOLIDATED RAIL CORPORATION : JURY TRIAL DEMANDED

COMPLAINT

1. Plaintiff James E. Gottshall is a citizen and resident of the Commonwealth of Pennsylvania.

2. The Defendant, Consolidated Rail Corporation (Conrail), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with a place of business at Six Penn Center Plaza, Philadelphia, Pennsylvania.

3. Plaintiff's cause of action arises under the Act of Congress of April 22, 1908, 35 Stat. 65, Chapter 149, and amendments thereto, commonly known as the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*

4. The Defendant was, at the time of the injury hereafter alleged, and is now doing business within the jurisdiction of this Court as an interstate common carrier of freight for hire by rail into and from the various States of the Union and the District of Columbia.

5. At the time of the accident and the injuries hereinafter alleged, Plaintiff was employed by the Defendant as a maintenance of way machine operator and was engaged in work in furtherance of interstate commerce.

6. On or about August 10, 1988, at or near Watsontown, Pennsylvania, Plaintiff was injured when he was required to work extensive overtime under extremely hot weather conditions, coupled with the death on the job of a fellow employee.

7. The accident was caused by the Defendant's violation of the above Act in that the Defendant failed to provide the Plaintiff with a reasonably safe place to work.

8. As a result of the Defendant's violation of the above Act, Plaintiff sustained emotional injury, including post traumatic stress disorder.

9. As a further result of the Defendant's violation of the above Act, Plaintiff has in the past and will in the future incur substantial medical expenses, and he has in the past and will in the future suffer a severe loss of earnings and an impairment of his earning capacity.

10. As a further result of the Defendant's violation of the above Act, Plaintiff has in the past and will in the future suffer great pain and suffering, mental anguish and other losses to his great mental, physical and financial harm.

WHEREFORE, Plaintiff demands judgment against the Defendant in an amount in excess of Seventy-Five Thousand Dollars (75,000.00) plus interest and costs.

G. SANDER DAVIS AND
ASSOCIATES

BY: /s/
G. SANDER DAVIS
JOHN J. O'BRIEN, JR.
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES E. GOTTSHALL	:	CIVIL ACTION
vs.	:	NO. 89-3102
CONSOLIDATED RAIL CORPORATION	:	JURY TRIAL DEMANDED

DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT

1. Admitted.

2. Admitted.

3. Defendant is advised that the allegations contained in Paragraph 3 of the plaintiff's Complaint are conclusions of law which require no answer.

4. Admitted.

5. Denied.

6. Denied.

7. Denied.

8. Denied.

9. Denied.

10. Denied.

SECOND DEFENSE

Any injuries sustained by plaintiff, as set forth in the Complaint, were caused in whole or in part by his own negligence.

THIRD DEFENSE

Plaintiff's complaint fails to state a claim for which relief can be granted under the terms of the Federal Employers' Liability Act.

FOURTH DEFENSE

Plaintiff's complaint fails to state a claim for which relief can be granted.

FIFTH DEFENSE

This court lacks jurisdiction of the subject matter of plaintiff's claim.

SIXTH DEFENSE

Plaintiff's exclusive remedy for the claim stated is under the Railroad Labor Act, 45 U.S.C. Sec. 151 *et seq.*, for which no action lies in this court.

SEVENTH DEFENSE

Plaintiff's claim is barred by the applicable statute of limitations.

/s/ ____________________
STANLEY S. FRAZEE, JR.
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CONSOLIDATED RAIL
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DATED: June 6, 1989

Carlisle v. Consolidated Rail Corporation

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Date	Event
November 16, 1988	Complaint. Jury trial demanded.
December 9, 1988	Answer.
September 25, 1989	Defendant's Motion for Summary Judgment, Memorandum of Law, and Certificate of Service.
October 4, 1989	Order that the time within which plaintiff is to respond to Defendant's Motion for Summary Judgment is extended until 11/6/89 (signed by Judge Robert S. Gawthrop III). 10/5/89 entered and copies mailed.
November 6, 1989	Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment and Certificate of Service.
May 7, 1990	Defendant's Supplemental Memorandum in Support of Defendant's Motion for Summary Judgment.
May 11, 1990	Argument of Defendant's Motion for Summary Judgment. Motion taken under advisement.
July 31, 1990	Memorandum and Order that Defendant's Motion for Summary Judgment is denied (signed by Judge Robert S. Gawthrop III). 7/31/90 entered and copies mailed.
August 13, 1990	Defendant's Motion for Reconsideration to Alter or Amend Judgment, Memorandum of Law, and Certificate of Service.
August 20, 1990	Order that Defendant's Motion for Reconsideration is granted. Order that this Court's Order of July 23, 1990 is hereby reaffirmed. Case shall be placed in the trial pool on Monday, November 5, 1990, to be called for trial upon 24 hours telephone notice (signed by Judge Robert S. Gawthrop). 8/21/90 entered and copies mailed.
August 23, 1990	Plaintiff's Brief in Opposition to Defendant's Motion to Reconsider.
October 5, 1990	Oral argument on 10/4/90 re: Defendant's oral motion to stay proceedings and Defendant's motion for reconsideration of court's summary judgment ruling.
October 5, 1990	Defendant's Motion to Vacate Judgment Pursuant to F.R.C.P. 60(b)(5) or (6) and Motion to Stay Proceedings During Pendency of Ruling on Said Motion Pursuant to F.R.C.P. 62(b), Memorandum of Law, and Certificate of Service.

Date	Event
October 15, 1990	Plaintiff's Answer to Defendant's Motion to Vacate and Motion to Stay, Brief, and Certificate of Service.
October 24, 1990	Defendant's Reply Memorandum of Law to Plaintiff's Brief in Opposition to Vacate Judgment Under F.R.C.P. 60(b) and Certificate of Service.
November 14, 1990	Order that Defendant's Motion to Vacate Judgment is denied and that this Court's Order of July 27, 1990 is hereby reaffirmed (signed by Judge Robert S. Gawthrop III). 11/15/90 entered and copies mailed.
November 15, 1990	Defendant's Pretrial Memorandum filed.
December 12, 1990	Defendant's Motion for Continuance of Trial and Certificate of Service.
December 18, 1990	Order that Defendant's Motion for Continuance of Trial is granted and that the Defendant shall transfer a letter to the court regarding the status of Mr. Turek and his ability to participate in the proceedings in the action forthwith. This case shall be placed in the trial pool on January 28, 1991, to be called for trial upon 24 hours telephone notice (signed by Judge Robert S. Gawthrop III). 12/19/90 entered and copies mailed.

Date	Event
February 5, 1991	Case called to trial. Twenty-nine jurors of panel present. Motions in limine and motion to continue case due to unavailability of essential witness argued. Court continues case to Monday, May 13, 1991. Jurors dismissed. Counsel argue motions re: Medical records of certain witness.
May 6, 1991	Motion by Defendant Consolidated Rail to vacate judgment order pursuant to F.R.C.P. 60(b)(5) or (6) due to change or clarification of law, Memorandum of Law, and Certificate of Service.
May 10, 1991	Supplement to Defendant Consolidated Rail's Pretrial Memorandum filed.
May 14, 1991	Order that Plaintiff's Motion to Compel Production of Defendant's medical-psychiatric records of Mr. Bruce Turek is granted; plaintiff's motion in limine to bar the introduction of evidence as to sick pay benefits received by Mr. Carlisle is granted; plaintiff's motion in limine to bar the introduction of evidence that Mr. Carlisle assumed the risk of his employment is granted (signed by Judge Robert S. Gawthrop III). 5/15/91 entered and copies mailed.

Date	Event
May 15, 1991	Civil Jury Trial. Day One (5/14/91); jury selection; jurors called and voir dired; 8 jurors selected and sworn; opening statements of counsel; Plaintiff's case; Alan Carlisle, called and sworn.
May 16, 1991	Civil Jury Trial. Day Two (5/15/91); Juror #53, Robert Ewart, dismissed from further service; plaintiff's case continued, etc.
May 17, 1991	Civil Jury Trial. Day Three (5/16/91); trial resumes; Plaintiff's case continues.
May 20, 1991	Civil Jury Trial. Day Four (5/17/91); Plaintiff's case continued; Plaintiff rests; Defendant's case; Defendant's witnesses called and sworn.
May 21, 1991	Civil Jury Trial. Day Five (5/20/91); Defendant's witnesses called and sworn; Defendant rests; charge conference; closing arguments; court's charge to the jury; jury retires to deliberate; jury question submitted to the Court; jury's request to be released for the day, and to resume deliberations on 5/21/91 granted.

Date	Event
May 21, 1991	Civil Jury Trial. Day Six (5/21/91); deliberations resume; jury question answered by the Court; verdict reached; jury finds in favor of the Plaintiff, Alan Carlisle, and against the Defendant, Consolidated Rail, and assesses damages in the amount of $386,500; jury polled; verdict recorded; jury dismissed from further service.
May 21, 1991	Verdict sheet and answers theretofor.
May 21, 1991	Order that Judgment is entered for Alan Carlisle against Consolidated Rail for $386,500 (signed by Judge Robert S. Gawthrop III). 5/22/91 entered and copies mailed.
May 21, 1991	Case closed.
June 3, 1991	Motion by Defendant Consolidated Rail for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial, Memorandum of Law, and Certificate of Service.
June 17, 1991	Memorandum of Law by Plaintiff Alan Carlisle in opposition to Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial.
March 25, 1992	Memorandum and Order denying Defendant Consolidated Rail's Motion for Judgment Notwithstanding the verdict and motion for new trial (signed by Judge Robert S. Gawthrop III). 3/25/92 entered and copies mailed.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Date	Event
April 1, 1992	Notice of Appeal filed by Consolidated Rail.
April 6, 1992	Civil case docketed.
May 18, 1992	Brief and Appendix on behalf of Appellant Consolidated Rail. Certificate of Service dated 5/18/92.
June 17, 1992	Brief on behalf of Appellee Alan Carlisle. Certificate of Service dated 6/17/92.
June 25, 1992	Reply Brief on behalf of Appellant Consolidated Rail. Certificate of Service dated 6/25/92.
September 21, 1992	Argued before Mansmann, Roth, Circuit Judges, and Restani, U.S. Court of International Trade.
March 29, 1993	Opinion (Mansmann, Roth, Authoring Judge, Circuit Judges, and Restani, U.S. Court of International Trade).
March 29, 1993	Judgment: Affirmed. Costs taxed against appellant.
April 20, 1993	Mandate issued. Record released.
June 11, 1993	Reported at 990 F.2d 90.
October 18, 1993	U.S. Supreme Court order dated 10/12/93 at Supreme Court number 92-1956, granting petition for writ of certiorari by Appellant Consolidated Rail in Court of Appeals number 91-1926.

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALAN CARLISLE, :
Plaintiff : NO. 88-8752
: CIVIL ACTION
vs. :
CONSOLIDATED RAIL CORPORATION : JURY TRIAL DEMANDED
Defendant :

1. This suit is brought pursuant to an Act of Congress known as the Federal Employer's Liability Act, Title 45 U.S.C.A. Section 51 et seq.

2. At all times material hereto, the defendant, CONSOLIDATED RAIL CORPORATION, was engaged in interstate commerce as a common carrier by railroad operating lines and a system of railroads in the Commonwealth of Pennsylvania and other states of the United States.

3. On or about August 14, 1988, the plaintiff, while the agent, servant, workmen and/or employee of the defendant and while acting within the scope of his employment engaged in the furtherance of interstate commerce or in work directly, closely or substantially affecting interstate commerce within the meaning of the

Federal Employers Liability Act, Title 45 U.S.C.A. Section 51 et seq., was working at Philadelphia, Pa., when he was injured due to unsafe and inadequate working conditions.

4. At the time and place hereinafter mentioned, the acts of omission and commission causing injuries to the Plaintiff were done by the defendant, their servants, agents and/or employees acting in the course and scope of their employment with and under the direct and exclusive control of the defendant.

5. All the property, equipment and operations involved in this accident hereinafter referred to were owned and/or under the direct and exclusive control of the defendant, their agents, servants and/or employees.

6. The aforesaid accident was due solely to the negligence, carelessness and recklessness of the defendant and its agents, servants, workmen and/or employees, acting within the scope of their employment, which negligence consisted of the following:

(a) failure to provide the plaintiff with a safe place to work as required by Title 45 U.S.C.A. Section 51 et seq.;

(b) failure to comply with safety rules and regulations of the defendant;

(c) failure to comply with the operating rules and regulations of the defendant;

(d) negligence of the defendant's agents, servants, workmen and/or employees;

(e) negligence at law; and

(f) otherwise failing to exercise due and adequate care under the circumstances.

7. As a direct result of the defendant's negligence, through its agents, servants, workmen and/or employees, the plaintiff suffered severe emotional, psychological and physical breakdown to include but not be limited to severe chest pain, dizziness, blackouts and major depression.

8. As a direct result of the defendant's negligence, through its agents, servants, workmen and/or employees, the plaintiff has been unable to attend to his usual duties and occupations, all of which caused substantial financial loss and all of which may and probably will continue in the future.

WHEREFORE, the plaintiff demands judgment against the defendant in an amount in excess of Seventy-Five Thousand ($75,000.00) Dollars.

JURY TRIAL DEMAND

A trial by jury is hereby demanded.

/s/ ____________________
J. MICHAEL FARRELL,
ESQUIRE

Dated: November 11, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALAN CARLISLE	:	CIVIL ACTION
vs.	:	NO. 88-8752
CONSOLIDATED RAIL CORPORATION	:	

ANSWER TO PLAINTIFF'S COMPLAINT

1. This paragraph states a conclusion of law; no answer is required.

2. Admitted.

3. Denied.

4. Denied.

5. Denied.

6. Denied.

7. Denied.

8. Denied.

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

This court lacks subject matter jurisdiction of this action.

THIRD DEFENSE

If plaintiff was injured as alleged, which is denied by defendant, then said injuries were solely and exclusively a result of plaintiff's negligence.

WHEREFORE, defendant denies that it is liable to plaintiff.

/s/ ______________________
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Attorney for Defendant

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DATED: December 9, 1988

⑪

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No. 92-1956

In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that there is a cause of action under the Federal Employers' Liability Act for negligent infliction of emotional distress that is not generally recognized under the common law?

2. Did the court of appeals err in holding that there is a cause of action under the Federal Employers' Liability Act for negligent infliction of emotional distress arising solely from a plaintiff's general working conditions?

3. Did the court of appeals err in holding that there is a cause of action under the Federal Employers' Liability Act for negligent infliction of emotional distress where the plaintiff neither experiences a physical impact nor reasonably fears the threat of a physical impact?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

The information concerning the Parties to the Proceeding set forth at page ii of the Petition for a Writ of Certiorari is accurate and is incorporated by reference herein. Since the date of the Petition for a Writ of Certiorari, Consolidated Rail Corporation has become a wholly-owned subsidiary of the publicly held corporation Conrail Inc. Consolidated Rail Corporation presently has an ownership interest in the following companies: The Akron & Barberton Belt Railroad Company; Albany Port Railroad Company; Belt Railroad Company of Chicago; Calumet Western Railway Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; Railroad Association Insurance, Limited; and TTX Company. Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

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No. 92-1956

In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

In *Gottshall v. Consolidated Rail Corporation,* the opinion of the United States District Court for the Eastern District of Pennsylvania (A-91 to A-105)[1] is reported at

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[1] References to the Appendix to the Petition for a Writ of Certiorari are designated "A-___." References to the Joint Appendix filed concurrently with this Brief are designated "JA-___." References to the Joint Appendix filed in the court of appeals in *Gottshall* are designated "GR-___." References to the Joint Appendix filed in the court of appeals in *Carlisle* are designated "CR-___."

773 F. Supp. 778 (E.D. Pa. 1991). The opinion of the United States Court of Appeals for the Third Circuit (A-1 to A-72) is reported at 988 F.2d 355 (3d Cir. 1993). The order of the court of appeals denying the petition for rehearing and suggestion of rehearing in banc (A-146 to A-147) also is reported at 988 F.2d 355 (3d Cir. 1993).

In *Carlisle v. Consolidated Rail Corporation*, the opinion of the United States District Court for the Eastern District of Pennsylvania denying Consolidated Rail Corporation's motion for summary judgment (A-106 to A-114) was not officially reported. The district court opinion denying Consolidated Rail Corporation's motion for judgment notwithstanding the verdict or for a new trial (A-115 to A-145) is reported at 790 F. Supp. 521 (E.D. Pa. 1992). The opinion of the United States Court of Appeals for the Third Circuit (A-73 to A-90) is reported at 990 F.2d 90 (3d Cir. 1993).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals in *Gottshall v. Consolidated Rail Corporation* was entered on February 8, 1993. The order denying the petition for rehearing and suggestion of rehearing in banc was entered on March 11, 1993. The judgment of the court of appeals in *Carlisle v. Consolidated Rail Corporation* was entered on March 29, 1993. The single petition for a writ of certiorari under Supreme Court Rule 12.2 was filed on June 9, 1993, and the petition for a writ of certiorari was granted on October 12, 1993.

STATUTORY PROVISION INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. § 51, provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASES

A. *Gottshall v. Consolidated Rail Corporation*[2]

On a hot day in August 1988, a Consolidated Rail Corporation ("Conrail") work gang was replacing a defective rail track in a remote area near Turbotville, Pennsylvania (A-2). Because of the time pressure, the workers were discouraged from taking scheduled work breaks, although breaks were permitted and water was available as needed (A-3). After several hours, one worker, Richard Johns, had a heart attack (*id.*). The supervisor was unable to radio for help because Conrail temporarily had taken the communications base station off the air for repairs without informing the work gang (A-4). While the supervisor drove for help, another worker, respondent James Gottshall, one of Johns' friends, tried without success to resuscitate Johns (A-3 to A-4). Johns died before the paramedics arrived (A-4). After the paramedics arrived, at their instruction, Johns' body was covered and remained on the scene until the coroner arrived (A-4, A-93). The workers were ordered back to work (A-4).

Gottshall, thirty-four years old, who had worked for Conrail for fifteen years (GR-77), was extremely upset by the incident (A-5). For several days he returned to work, but then, fearing that he, too, would have a heart attack, told his supervisor that he could no longer endure the hot weather conditions and his exhaustion, went home, secluded himself in his basement, and subsequently spent three weeks as an in-patient at a psychiatric institution (A-6). Gottshall experienced physical symptoms of emotional distress, including anxiety, insomnia, cold sweats, loss of appetite, nausea, weakness, nightmares, a fear of leaving home, and weight-loss (*id.*). He was diagnosed as suffering from major depression and post-traumatic stress disorder (*id.*).

Gottshall brought an action in the District Court for the Eastern District of Pennsylvania under the Federal Employers' Liability Act ("FELA") against Conrail for negligent infliction of emotional distress (*see* JA-4 to JA-5). Gottshall claimed that Conrail's management decisions were negligent, alleging that "[p]laintiff was injured when he was required to work extensive overtime under extremely hot weather conditions, coupled with the death on the job of a fellow employee" (JA-5). Federal jurisdiction was based on 28 U.S.C. § 1331.

The district court granted Conrail's motion for summary judgment (A-91 to A-105). It held that Gottshall's claims did not give rise to a cause of action for negligent infliction of emotional distress under any accepted common law theory (A-97 to A-100), and, furthermore, that it did not satisfy the general common law tort requirements of foreseeability, cause in fact, and proximate cause (A-100 to A-105).

The court of appeals reversed in a 2-1 decision (A-1 to A-72). Judge Roth, in dissent, stated that Conrail did not breach a duty to Gottshall and could not have foreseen Gottshall's injury (A-66).

The majority acknowledged that Gottshall's claim for negligent infliction of emotional distress would not be cognizable under the common law because it did not fall within the traditional common law "physical impact," "zone of danger," or "bystander" tests developed by the common law courts to delimit liability for emotional distress claims (A-29 to A-30). Nevertheless, the court held that Gottshall had stated a claim under the FELA. In so holding, the majority developed a new and expansive test for liability for negligent infliction of emotional distress under the FELA, emphasizing that the "issue is whether the factual circumstances . . . provide a threshold assurance that there is a likelihood of genuine and severe emotional injury" (A-35). If so, then as long as the emotional distress claim satisfies the general physical injury tort requirements of breach of duty, injury, and causation, it will be cognizable.

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[2] The court of appeals in *Gottshall* was reviewing the district court's grant of summary judgment for Conrail. Accordingly, for purposes of this Brief, Conrail will assume the facts in the light most favorable to the plaintiff. *See Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962).

In permitting recovery for an emotional distress claim not recognizable under common law, the court reasoned that: (1) the predominant purpose of the FELA is to assure a liberal recovery for all injured employees (A-25 to A-31); (2) the sole purpose of the common law tests for negligent infliction of emotional distress is "to glean the meritorious from the feigned and frivolous" (A-31); (3) "in many ways FELA is the antithesis of the common law" (A-29), and, accordingly, "doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims" (A-30); and (4) therefore, there exists a cause of action for negligent infliction of emotional distress under the FELA that is not generally recognized under the common law.

The result of the court's reasoning was that Gottshall, who clearly would not be able to recover under any common law test for negligent infliction of emotional distress, could recover under the FELA. The breadth of

the holding is best illustrated by its very first application – *Carlisle v. Consolidated Rail Corporation.*

B. *Carlisle v. Consolidated Rail Corporation*

Alan Carlisle was a Conrail train dispatcher and then a supervisor of rail operations from 1976 until 1988 (A-74). In 1984, Conrail reduced its work force, which in turn increased the amount of work for which Carlisle was responsible (*id.*). In addition, some of the equipment with which he worked was outdated and functioned poorly (*id.*). In 1988, Carlisle became a trainmaster, although he still worked at times as a supervisor and dispatcher and retained many of his former responsibilities (*id.*). Carlisle experienced stress from the demands of his job, which he alleged caused insomnia, fatigue, headaches, depression, sleepwalking, and weight-loss. During one period, according to Carlisle's testimony, he worked twelve to fifteen hour shifts for fifteen days (A-75). Carlisle eventually had a nervous breakdown (*id.*).

Carlisle brought an action in the District Court for the Eastern District of Pennsylvania under the FELA against Conrail for negligent infliction of emotional distress (*see* JA-15 to JA-17). Federal jurisdiction was based on 28 U.S.C. § 1331.

The district court denied Conrail's motion for summary judgment (A-106 to A-114). The jury returned a verdict for Carlisle for $386,500, and the district court denied Conrail's motion for judgment notwithstanding the verdict or for a new trial (A-115 to A-145).

The court of appeals affirmed (A-73 to A-90). Characterizing its decision in *Gottshall* as "for the first time up[holding] recovery under the FELA for negligent infliction of emotional distress without proof of any physical impact, under circumstances where the emotional distress was accompanied by physical manifestations" (A-84), the court in *Carlisle* construed the issue before it as whether "protracted exposure to work-related, stressfully injurious conditions [can] lead to liability under the FELA" (A-87).

On the basis of the expansive test adopted in *Gottshall*, the court of appeals held that it was "reasonably foreseeable that extended exposure to dangerous and stressful working conditions [would] cause injury to [Carlisle]" (A-88 to A-89). In so holding, the court relied on the facts that (1) Carlisle and his co-workers had complained to Conrail about stresses caused by their working conditions, and several co-workers had filed FELA actions against Conrail for emotional distress (A-87 to A-88); and (2) the Federal Railway Administration had issued two reports, one that documented the stressful nature of a train dispatcher's job and one that criticized the outdated equipment and working conditions at Conrail's dispatching office (A-88).

SUMMARY OF ARGUMENT

These two cases call upon this Court to determine whether a railroad employer owes a broader duty under the FELA to protect its employees from negligent infliction of emotional distress than exists under the common law. In *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 568 (1987), this Court left open the question of what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the FELA, directing the lower courts to "glean[] guidance from common-law developments" in ascertaining whether in any particular case such a cause of action would be cognizable.

In addition to the general physical injury tort requirements of breach of duty, injury, and causation, the common law imposes one of the following threshold requirements on recovery for negligent infliction of emotional distress: (1) that a plaintiff experience an actual physical impact ("the physical impact test"); (2) that a plaintiff either experience or reasonably fear the threat of a physical impact ("the zone of danger test"); or (3) that a plaintiff contemporaneously witness harm to an immediate family member from a physical impact ("the relative bystander test"). It does so because of concerns that, unlike physical injury claims, emotional distress claims can extend without limit; damages for emotional injuries often are incalculable; trivial emotional upsets are not the proper subject for the tort system; and there must be some assurance of genuineness of emotional distress claims.

The court of appeals here disavowed these common law tests, relying upon what it identified as the broad remedial purposes of the FELA to allow a cause of action for negligent infliction of emotional distress whenever an injury has "indicia of genuineness" and satisfies the general tort requirements of breach of duty, injury, and causation.

However, the test adopted in *Gottshall* and applied in *Carlisle* transforms the FELA into a full recovery, general foreseeability statute in contravention of the purpose of the FELA, the applicable precedents of this Court, and the decisions of every other court of appeals to have considered the issue. Contrary to the court of appeals' conclusions, the FELA is a negligence statute, with its roots in the common law, enacted to address the unusual physical dangers of the railroad industry.

Moreover, the court of appeals' expansive test ignores the Railway Labor Act ("RLA") and other ways that employees negotiate their working conditions. Although this Court held in *Buell* that the jurisdiction of the RLA does not determine whether a railroad worker's claims of intentional harassment are compensable under the FELA, remedies under the RLA nonetheless should be considered in determining the ~~scope of~~ emotional distress claims that arise from the railroad's alleged negligence in matters involving ordinary working conditions – such as hours of work, location of work, amount of work, and number of work breaks – that are at the heart of the RLA's elaborate arbitration and collective bargaining scheme.

Perhaps the reason that the court of appeals went so far astray in these cases can be found in the famous admonition of Justice Holmes:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

Certainly, the facts in *Gottshall* troubled the court of appeals. However, a desire to compensate a single plaintiff does not justify bending settled principles of law to allow a cause of action for negligent infliction of emotional distress that is unprecedented under either the

FELA or the common law – and that is so broad it permits the very next plaintiff, Carlisle, to recover for stress caused by the ordinary working conditions of his job.

In determining the contours of an employer's duty with respect to emotional distress claims under the FELA, this Court must balance a number of policy considerations, including the negligence basis of the FELA; the purposes of the FELA; the congressional concern in enacting the FELA with addressing the unusual physical dangers of the railroad industry; the established procedures of the RLA that require railroad working conditions to be established through negotiation between management and labor; the potential for incalculable and unlimited damages for emotional distress, especially in view of the unique susceptibilities of each individual; and the danger of fraudulent emotional injury claims.

In balancing these policy considerations, recovery for negligent infliction of emotional distress under the FELA should be limited to situations that satisfy the common law threshold requirement that the plaintiff either experience an actual physical impact or reasonably fear the threat of a physical impact – a requirement not satisfied in either *Gottshall* or *Carlisle.* This "zone of danger" test, a widely-accepted, "middle-ground" test under the common law, best accords with the FELA's remedial purpose while recognizing the unusual physical dangers of the railroad industry with which Congress was concerned when it enacted the FELA. Moreover, the development of the common law makes clear that the zone of danger test is workable and just and strikes the most appropriate balance among the various policy considerations at stake.

ARGUMENT

I. THE FELA DOES NOT PERMIT RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UPON A BARE SHOWING THAT AN INJURY IS GENUINE AND FORESEEABLE.

A. The Court Of Appeals' Expansive Test Is Inconsistent with the FELA.

The FELA is firmly grounded in the common law of negligence. While it is true that the FELA is a broad remedial statute, *see, e.g., Urie v. Thompson*, 337 U.S. 163, 181 (1949), it was enacted to address the unusual physical dangers of the railroad industry, not to compensate railroad workers for emotional injuries caused by ordinary working conditions divorced from those extraordinary physical dangers.

It is these two fundaments of the FELA – that it is based in the common law of negligence and that it was enacted to address the unusual physical dangers of the railroad industry – that the court of appeals in *Gottshall* and *Carlisle* disregarded in adopting its general foreseeability test for negligent infliction of emotional distress claims.

1. The FELA is based on the common law of negligence.

The operative provision of the FELA provides: "Every common carrier . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the *negligence* of any . . . such carrier. . . . " 45 U.S.C. § 51 (emphasis added). The FELA changed the common law liability of railroad employers to their employees by (1) abolishing the fellow servant rule; (2) rejecting the doctrine of contributory negligence in favor of comparative negligence; and (3) prohibiting an employer from exempting itself by contract from the FELA. *See* 45 U.S.C. §§ 51, 53-55; H.R. Rep. No. 1386, 60th Cong., 1st Sess. 1 (1908). In 1939, Congress amended the FELA to eliminate the defense of assumption of risk. *See* H.R. Rep. No. 1222, 76th Cong., 1st Sess. (1939).

However, liability under the FELA always was and continues to be based on the common law principle of negligence, "the breach of some duty found to rest upon the employer," W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Torts* § 80 at 578 (5th ed. 1984), and not solely on the fact that "genuine" injuries have occurred. In this sense, the FELA preserved common law negligence principles with the specific statutory modifications listed above. As this Court repeatedly has recognized, the FELA is founded on negligence principles and is neither an insurance nor a no-fault statute equivalent to a workers' compensation scheme. *See, e.g., Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959); *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947); *see also Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) ("The FELA . . . impose[s] upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer's fault").

In *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557 (1987), this Court was asked for the first time to decide whether a cause of action for emotional injury is cognizable under the FELA. Although the Court found the record insufficiently developed to decide whether the scope of the FELA includes emotional injury claims, it directed the lower courts to "glean[] guidance from common-law developments" in ascertaining whether in any particular case, such a cause of action would be available. *Id.* at 568.

This Court's emphasis in *Buell* on the common law basis of the FELA is consistent with its general FELA jurisprudence. While consistently reaffirming the broad remedial purpose of the FELA, the Court has rejected attempts such as those by the court of appeals in these two cases to (1) abandon the negligence standard of the FELA in the name of the statute's broad remedial purpose; and (2) compensate railroad workers for the ordinary dangers of railroading. *See, e.g., Herdman v. Pennsylvania R.R.*, 352 U.S. 518, 520 (1957); *Reynolds v. Atlantic Coast Line Ry.*, 336 U.S. 207, 208 (1949).

As a general matter, the history of FELA interpretation by this Court is not one of constantly increasing remedies for plaintiffs beyond the limitations of the common law, as the court of appeals' opinions would lead one to believe. *See, e.g., Gottshall*, App. at A-29 ("in many ways FELA is the antithesis of the common law"); *id.* at A-30 ("doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims").

To the contrary, this Court repeatedly has emphasized that the FELA is rooted in the common law. *See, e.g., Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 337-39 (1988) (no right to prejudgment interest under the FELA because Congress did not expressly provide for such damages and such damages did not exist at common law at the time the FELA was enacted); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 69-71 (1913) (limiting available damages in FELA wrongful death actions to pecuniary losses because only pecuniary damages for wrongful death are available at common law); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (following *Vreeland* in the context of a Jones Act suit); *Gulf, Colorado & Santa Fe Ry. v. McGinnis*, 228 U.S. 173, 176 (1913) (reiterating that damages under the FELA are limited to pecuniary losses); *American R.R. v. Didricksen*, 227 U.S. 145, 182 (1913) (same); *cf. Urie*, 337 U.S. at 182 (recognizing that if occupational diseases were not compensable at common law, it would "lend substance to the argument" that they should not be compensable under the FELA).[3]

Furthermore, the three decisions of this Court upon which the court of appeals relied do not support imposing a duty on FELA employers that is not generally recognized at common law. In *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 506 (1957), this Court concluded that where "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought," the question of negligence is for the jury. In *Kernan*, 355 U.S. at 438-39, the Court held that the plaintiff could assert a negligence *per se* theory even though the regulation violated (requiring navigation lights to be set at a certain height above the water) was not designed to prevent the type of harm that resulted (an explosion caused by a navigation light placed too close to the water that was coated by flammable petroleum products). In *Urie*, 337 U.S. at 181-82, this Court held that an employee could recover for silicosis, an occupational disease, even though the employee's physical injury was the result of long-term exposure and not of a sudden traumatic accident.

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[3] This Court has declined to expand the FELA in other respects. *See, e.g., Kelley v. Southern Pac. Co.*, 419 U.S. 318, 323 (1974) (employee of motor carrier that was agent of railroad not covered by the FELA); *Crane v. Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166-67 (1969) (railroad has contributory negligence defense in suit by nonemployee working on train even though defense would not be available if one of railroad's employees working on same train brought suit under the FELA); *Ward v. Atlantic Coast Line R.R.*, 362 U.S. 396, 397-98 (1960) (company that repaired tracks for railroad not agent of railroad under the FELA); *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334, 341-42 (1953) (brakeman injured while aboard car float on navigable waters not covered by the FELA); *Chesapeake & Ohio Ry. v. Stapleton*, 279 U.S. 587, 597 (1929) (violation of state child labor law not negligence under the FELA).

Thus, these cases did not eliminate the common law negligence analysis, but only made it easier for a plaintiff to plead a traditional negligence case: *Rogers* relaxed concepts of causation under the FELA; *Kernan* relaxed a technical restriction on principles of negligence *per se*; and *Urie* included occupational disease as a compensable physical injury. While these decisions speak of liberal recovery under the FELA, they do not reject common law negligence principles as do the *Gottshall* and *Carlisle* decisions.

This Court's precedents do not suggest that any railroad employee alleging any kind of injury may automatically recover as long as the injury is genuine and foreseeable. Likewise, they do not support a holding that railroads owe a broader duty to protect their employees from negligent infliction of emotional distress than exists under the common law. And they do not hold that employees like Gottshall and Carlisle may recover for emotional injury caused by the day-to-day stresses of their employment.

2. Congress enacted the FELA to address the unusual physical dangers of the railroad industry.

The emphasis of the FELA is on physical injuries and death. The FELA creates liability for "injury or death resulting in whole or in part from the negligence" of common carriers. 45 U.S.C. § 51. At the turn of the century when the FELA was enacted, railroad workers were experiencing serious physical injuries and death at an alarming rate. S. Rep. No. 432, 61st Cong., 2d Sess. 2 (1910).[4] Indeed, in 1889, President Harrison told Congress " '[i]t is a reproach to our civilization that any class of American workmen, should in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.' " Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160, 162-66 (1953) (citing *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904)). In urging Congress to enact the FELA, President Roosevelt condemned placing "the entire burden of the loss of life or limb upon the victim or the victim's family." S. Rep. No. 432, 61st Cong., 2d Sess. 2 (1910).

Thus, the Committee Report accompanying the House Bill emphasized that the FELA would make the employer "liable for injury caused by defects or insufficiencies in the roadbed, tracks, engines, machinery, and other appliances used in the operation of railroads." H.R. Rep. No. 1386, 60th Cong., 1st Sess. 2 (1908). Similarly, the Senate Report centered on the "dangers of . . . employment and defects in machinery" and deplored "leaving the workman to take the risk of all dangers incident to unguarded machinery." S. Rep. No. 460, 60th Cong., 1st Sess. 2 (1908).

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[4] In 1908, the total casualties to trainmen on interstate railroads were 281,645. S. Rep. No. 432, 61st Cong., 2d Sess. 2 (1910). In the congressional debates, the members of the House of Representatives spoke generally of injuries and deaths caused by defects in machinery, *see, e.g.*, 42 Cong. Rec. 4434-35 (1908) (remarks of Rep. Clayton); of the serious injuries and loss of human life on the railroads, *see, e.g.*, *id.* at 4607 (remarks of Rep. Flood); and of injuries and deaths caused by train wrecks, *see, e.g.*, *id.* at 4604 (remarks of Rep. Driscoll). Similarly, the discussion in the Senate centered on defects in machinery, *see, e.g.*, *id.* at 4527, 4532 (remarks of Sen. Dolliver); and injuries and deaths caused in the course of operating a train, *see, e.g.*, *id.* at 4541 (remarks of Sen. Beveridge).

In a later report to Congress, Senator Borah of the Judiciary Committee described the FELA as a statute that:

> places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling.

S. Rep. No. 432, 61st Cong., 2d Sess. 2 (1910); *see also Wilkerson*, 336 U.S. at 68 (Douglas, J., concurring) (FELA enacted to "put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations"); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 59 n.4, 65 & n.21 (1943).

This history reinforces the words of the statute and demonstrates that in enacting the FELA, Congress was concerned with the physical dangers of the railroad industry and with the severe injuries – and deaths – resulting therefrom. The statute was not intended to reach emotional injuries resulting from a railroad employee's ordinary working conditions. While the remedy provided by the FELA is not expressly or immutably tied to the precise injuries contemplated by Congress in enacting the statute, the original concerns of Congress should not be ignored, as they were by the court of appeals, which in effect created a remedy for the ordinary rigors and stresses of railroad work.

As the Court of Appeals for the Second Circuit recently explained in affirming the dismissal of an emotional distress claim under the Jones Act,[5] in terms equally applicable here:

> Although Exxon had a duty to provide a reasonably safe workplace, Exxon had no duty to keep Puthe safe from the rigors of a job as a seaman. Puthe's allegations refer to seemingly common occurrences for seamen. It appears obvious to this Court that seamen must expect to encounter certain dangers on the job and to work during adverse weather conditions. They have "knowingly and voluntarily chosen callings which . . . involve braving certain hazards and are traditionally not well suited to the squeamish or faint-hearted." If seamen were excused from working on deck during high seas and cold winds, the ocean would be filled with crewless boats.

Puthe v. Exxon Shipping Co., 2 F.3d 480, 483 (2d Cir. 1993) (citation omitted) (quoting *Gaston v. Flowers Transp.*, 866 F.2d 816, 820 (5th Cir. 1989)).

3. In rejecting the negligence basis of the FELA and in ignoring the FELA's purpose to address the unusual physical dangers of the railroad industry, the court of appeals created an unwarranted test of FELA liability.

In *Gottshall* and *Carlisle*, the court of appeals ignored the negligence basis of the FELA and the purpose of the statute to provide a remedy for the unusual physical dangers of railroad work. The court of appeals' radical departure from common law negligence principles is evident from its explicit rejection of the common law tests for negligent infliction of emotional distress; its focus on the "genuineness" of a plaintiff's claim rather than on a defendant's fault; its application of general tort principles that elevates "foreseeability" above all other elements; and the fact that Gottshall and Carlisle in all likelihood could not recover workers' compensation under the no-fault workers' compensation schemes of many states.

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[5] The Jones Act incorporates the negligence standards and the remedies of the FELA. *See* 46 U.S.C. § 688; *see also Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 547 (1960).

Common law courts historically have been wary of imposing liability for emotional distress due to a fear of: (1) potentially unlimited claims; (2) incalculable damages; (3) a flood of litigation brought by those with trivial or intangible emotional distress claims; and (4) fraudulent claims. *See, e.g., Maloney v. Conroy*, 208 Conn. 392, 397-98, 545 A.2d 1059, 1061-62 (1988). *See generally Restatement (Second) of Torts* § 436A comment b (1965).

In order to accommodate these concerns, the common law developed three tests to limit recovery for negligent infliction of emotional distress.[6] A minority of states applies some version of the "physical impact" test, which allows recovery for negligent infliction of emotional distress only if the plaintiff experiences an actual physical impact that, in turn, causes an emotional injury. A significantly larger number of states and the District of Columbia permit recovery for negligent infliction of emotional distress if the plaintiff either experiences a physical impact or is in the "zone of danger" of a physical impact, that is, if the plaintiff faces a threat of a physical impact

and reasonably fears for his or her safety as the result of that threat. Finally, another group of states enlarges the zone of danger test in a limited circumstance by allowing a plaintiff to recover damages for emotional distress as the result of contemporaneously witnessing harm to immediate family members from a physical impact, even if the plaintiff, the so-called "bystander," is not personally in the zone of danger of the physical impact.[7]

Contrary to the court of appeals' assertions in *Gottshall* and *Carlisle* that the sole purpose of the common law tests is to weed out fraudulent claims, *see Gottshall*, App. at A-31; *Carlisle*, App. at A-81, all are attempts to curtail the unlimited liability that results from the imposition of a general foreseeability test. In short, the common law tests for negligent infliction of emotional distress define whether a particular defendant owes a particular plaintiff a duty of care. *See Thing v. La Chusa*, 48 Cal. 3d 644, 654 n.3, 771 P.2d 814, 819 n.3, 257 Cal. Rptr. 865, 870 n.3 (1989).

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[6] For the Court's convenience, a compilation of the states that have adopted each of the common law negligent infliction of emotional distress tests appears in the Appendix attached to this Brief.

[7] There are a few state courts that refuse absolutely to recognize a cause of action for the negligent infliction of emotional distress. *See Allen v. Walker*, 569 So. 2d 350 (Ala. 1990); *Mechanics Lumber Co. v. Smith*, 296 Ark. 285, 752 S.W.2d 763 (1988). At the other end of the spectrum, Hawaii has adopted a unique and expansive general foreseeability approach that resembles the approach taken by the court of appeals in these cases. *See, e.g., Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970); *Campbell v. Animal Quarantine Station*, 63 Haw. 557, 632 P.2d 1066 (1981). In addition, in cases in which there is some special relationship between plaintiff and defendant, as between a patient and his or her doctor, some courts have found a duty owed by the defendant to protect the plaintiff ("the direct victim") from negligent infliction of emotional distress. *See, e.g., Burgess v. Superior Court*, 2 Cal. 4th 1064, 831 P.2d 1197, 9 Cal. Rptr. 2d 615 (1992); *Corgan v. Muehling*, 143 Ill. 2d 296, 574 N.E.2d 602, 158 Ill. Dec. 489 (1991).

An expansive test like that adopted by the court of appeals, in contrast, in which any plaintiff who foreseeably may be harmed emotionally will recover, fails to take into consideration the policy judgments essential to the negligence system. As explained by Dean Prosser:

> There is still the problem of an end to liability, of a place to stop. It is still unthinkable that anyone shall be liable to the end of time for all of the results that follow in endless sequence from his single act. Causation cannot be the answer; in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world. Any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts, which would "set society on edge and fill the courts with endless litigation."

Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 24 (1953) (footnote omitted); *see also Thing*, 48 Cal. 3d at 654, 771 P.2d at 819, 257 Cal. Rptr. at 870 (1989) ("policy considerations mandate[] that infinite liability be avoided by restrictions that . . . somehow narrow the class of potential plaintiffs").

By refusing to apply the common law negligent infliction of emotional distress tests, the court of appeals abdicated its judicial responsibility to determine the appropriate boundaries for negligent infliction of emotional distress claims under the FELA. In place of the common law tests, the court applied an *ad hoc* "indicia of genuineness" test and general tort principles to determine liability (A-57). However, in actuality, both the court's *ad hoc* "genuineness" test and its application of general tort principles impose virtually unlimited liability on FELA defendants.

The court of appeals' focus on whether a claim is genuine caused it to abandon all common law limitations on a railroad's duty. However, this focus is improper under a negligence analysis. *Cf.* 3 F. Harper, F. James & D. Gray, *The Law of Torts* § 18.2, at 665 (1986) (discussing duty issue and noting that "if there were ever complete social insurance for bodily injury or disability, however caused, the only questions would be those as to genuineness, or the extent, of the injury, and the like"). A no-fault or insurance statute compensates all genuine job-related injuries suffered by employees, without regard to negligence. The FELA, in contrast, compensates only those genuine job-related injuries suffered by employees that are caused by some breach of duty owed by the employer to the employee. Neither at common law nor under the FELA may a plaintiff recover solely because he or she has genuine injuries.

Moreover, despite discussing well-recognized tort elements of foreseeability, breach of duty, injury, and causation, the court of appeals' general tort analysis in actuality elevates foreseeability over all other elements. *See, e.g., Gottshall*, App. at A-51 ("the precipitating event triggering Gottshall's injury was foreseeable"); *id.* at A-54 (genuine issue whether Conrail breached duty of care because Gottshall's injury could be found to be foreseeable); *id.* at A-57 (breach of duty arises from "an act or omission creating a foreseeable risk"). Indeed, in *Carlisle*, the court concluded that protracted exposure to stressful work conditions could lead to liability under the FELA because the "injurious result was reasonably foreseeable." *Carlisle*, App. at A-87.

The fallacy of utilizing foreseeability as the primary test of liability, however, is that – as the experience of the common law courts teaches – foreseeability places no limits at all on a defendant's liability. *Cf. Gaston*, 866 F.2d at 820 (expansion of liability to bystanders for emotional injury would create "random and wayward" consequences that would multiply "damages incalculably on the basis of factors which are entirely incidental to the operation of the train or vessel and which bear little or no relationship to the safety of that venture").

Thus, the court in *Gottshall* concluded that it was foreseeable that Gottshall would experience an emotional injury because he saw his friend die and because he labored under the same working conditions as his friend. Under the court's reasoning, it surely is no less foreseeable that other men on Gottshall's crew – or even men on other Conrail crews hearing of Johns' death – also would suffer emotional injuries because of the hard labor that their jobs required them to perform on a hot day. Similarly, Carlisle's principal evidence of stress consisted of his and other employees' complaints and of two reports detailing the stress of a train dispatcher's job. It is no less foreseeable that any Conrail dispatcher would suffer stress from the demands of the position. It is because of this very real potential for unlimited liability that the common law courts place the limits on recovery for negligent infliction of emotional distress that the court of appeals here rejected.

Indeed, there exists a diversity of psychological make-ups among railroad employees, just as among the general population, and different people inevitably will react to the same events in different ways. *See* Testimony of plaintiff's expert, Dr. Bernard Albert, at 178 (CR-757) (testifying that people react to different levels of stress and different kinds of stress in different ways); Testimony of plaintiff's expert, Dr. Lawrence Real, at 29-30 (CR-813 to CR-814) (testifying that Carlisle might be among the twenty percent of the population that is genetically vulnerable to major depression). Under the court of appeals' approach, railroad employers will be forced to conform their conduct to the possible reaction of the most emotionally fragile of their employees, a result explicitly rejected at common law. *See, e.g., Caputzal v. Lindsay Co.*, 48 N.J. 69, 76, 222 A.2d 513, 517 (1966); *Williamson v. Bennett*, 251 N.C. 498, 505, 112 S.E.2d 48, 53 (1960).

For these reasons, with but few exceptions, federal courts that have considered the issue have determined that stress caused by ordinary working conditions cannot support a recovery under the FELA. *See, e.g., Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 813 (7th Cir. 1985) (a claim for "too much – not too dangerous – work . . . is not our idea of an FELA claim"), *cert. denied*, 480 U.S. 945 (1987); *see also Puthe*, 2 F.3d at 483-84; *Elliott v. Norfolk & W. Ry.*, 910 F.2d 1224, 1229-30 (4th Cir. 1990); *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539-40 (6th Cir. 1990); *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 426 (6th Cir. 1988).

The breadth of the court of appeals' holding is further evident from the fact that in all likelihood, Gottshall and Carlisle could not recover under many workers' compensation systems, which, unlike the FELA, are no-fault systems. While it is difficult to generalize about workers' compensation recoveries for mental stress because of the variety of approaches taken by the states, one widely-accepted test – and the one advocated by the leading commentator in the workers' compensation field – is that work stresses should be compensable if such stresses are "sufficiently more damaging than those of everyday employment life." 1B A. Larson, *The Law of Workmen's Compensation* § 42.23(b), at 7-923 (1993).

Applying this test, a number of courts refuse to award workers' compensation to employees who allege mental injuries arising from the normal stresses of their high stress jobs because such stress simply is not an abnormal working condition. *See, e.g., Sloss v. Industrial Comm'n*, 121 Ariz. 10, 11, 588 P.2d 303, 304 (1978); *Chicago Bd. of Educ. v. Industrial Comm'n*, 169 Ill. App. 3d 459, 467-68, 523 N.E.2d 912, 918, 120 Ill. Dec. 1, 7, *appeal denied*, 122 Ill. 2d 571, 530 N.E.2d 241, 125 Ill. Dec. 213 (1988); *Jensen v. New Mexico State Police*, 109 N.M. 626, 629-30, 788 P.2d 382, 385-86 (Ct. App.), *cert. denied*, 109 N.M. 563, 787 P.2d 1246 (1990); *Jackson v. Liberty Mut. Ins. Co.*, 580 S.W.2d 70, 71 (Tex. Ct. App. 1979).

As one court explained:

> If we allowed workers to recover for long-term mental injuries when those injuries were triggered by everyday work stress, then almost all mental injuries would be compensable from the worker's compensation fund. There are very few workers with nontraumatic mental problems who cannot show that job stress contributed to their problems. The employers would become insurers for almost all mental illnesses suffered by their employees.

Graves v. Utah Power & Light Co., 713 P.2d 187, 192 (Wyo. 1986).

In sum, therefore, the court of appeals' expansive test has no basis in the common law tort of negligent infliction of emotional distress, the negligence standard of the FELA, or the FELA's purpose to address the unusual physical dangers of the railroad industry. Indeed, the court of appeals' decisions in *Gottshall* and *Carlisle* are wholly inconsistent with these well-established principles of FELA jurisprudence.

B. The Court of Appeals' Expansive Test Allows Liability Under the FELA for Matters Involving a Railroad Employee's General Working Conditions That More Properly Are Addressed Under the Railway Labor Act.

The court of appeals' opinions in *Gottshall* and *Carlisle* open the door to liability for general work stresses and routine management decisions. They pose the precise threat to the RLA legislative scheme to which this Court was sensitive in *Buell*. The specific question decided in *Buell* was whether a railroad worker's remedy before the National Railroad Adjustment Board ("NRAB") pursuant to the RLA, 45 U.S.C. § 151 *et seq.*,[9] precluded the railroad worker's claim for emotional injuries arising from intentional harassment, threats, and intimidation inflicted by his supervisors and co-workers pursuant to the FELA.

In *Buell*, the district court held that the plaintiff's claim for emotional injuries was a minor dispute under the RLA and therefore subject to the exclusive jurisdiction of the NRAB. The Court of Appeals for the Ninth Circuit reversed the district court, holding that Buell's claim of intentional harassment was not a "minor dispute" within the exclusive jurisdiction of the NRAB. *Buell*, 480 U.S. at 560. This Court affirmed on the jurisdictional issue, explaining that "absent an intolerable conflict between the two statutes [the FELA and the RLA], we are unwilling to read the RLA as repealing any part of the FELA." *Id.* at 566-67.

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[9] The RLA establishes elaborate administrative procedures to resolve both major and minor disputes between railroad employees and their employers. Major disputes are those arising "out of the formation or change of collective bargaining agreements covering rates of pay, rules or working conditions." *Detroit & Toledo Shore Line R.R. v. Transportation Union*, 396 U.S. 142, 145 n.7 (1969). Minor disputes are those that "grow out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." *Buell*, 480 U.S. at 563; *see also Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 307 (1989). Minor disputes in the railroad industry are subject to binding and compulsory arbitration before either a national adjustment board, 45 U.S.C. § 153 First, or before an adjustment board established by both the employer and the union representing the employee, *id.* § 153 Second. The adjustment boards have exclusive jurisdiction over minor disputes. *Consolidated Rail Corp.*, 491 U.S. at 303-04.

In response to an argument raised by an *amicus*, the Association of American Railroads, that a large portion of the 183,800 grievances filed under the auspices of the RLA in 1985 would be pursued as FELA actions instead were this Court to rule as ultimately it did in *Buell*, the Court remarked that "[t]his parade of horribles mistakenly assumes that a significant percentage of employees bringing grievances suffer the type of *severe emotional injury* that has generally been required to establish liability for purely emotional injury . . . and that a significant percentage of employees are subject to the type of *unconscionable abuse* which is a prerequisite for recovery." *Id.* at 566 n.13 (emphasis added). *See also Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 305-06 (1977) (cited in *Buell*).

Thus, while *Buell* held that recognition of the plaintiff's claims of intentional harassment would not interfere with the legislative scheme of the RLA, it did not hold that *any* claim for emotional distress pled by *any* plaintiff would be cognizable. To the contrary, there might be some FELA cases that create "an intolerable conflict" between the RLA and the FELA and in such cases the FELA's scope should be construed so as not to encroach upon the legislative scheme established by the RLA.

These are just such cases. As Judge Roth correctly noted in her dissent, aside from knocking out the radio relay, all of Gottshall's allegations consist of "the negotiated circumstances of the duties of this work crew" (A-69). Similarly, Carlisle's complaint was that Conrail gave him too much work to perform and outdated equipment with which to perform it.

Unlike the claims of intentional conduct arising from the harassment in *Buell*, claims of negligent conduct arising from the negotiated circumstances of an employee's job simply are not the type of claims that should be cognizable in an FELA action for negligent infliction of emotional distress. There is reason to make *intentional* conduct such as that alleged in *Buell* not subject to the exclusive remedies of the RLA because such "extreme and outrageous conduct," *Restatement (Second) of Torts* § 46 (1965), generally is not the subject of collective bargaining. However, this rationale evaporates when it comes to *negligent* conduct involving working conditions that have been set by collective bargaining between the employer and its employees.

If employees are unhappy with working conditions, the appropriate way to address such conditions is through negotiation, dispute resolution, and collective bargaining between the railroad and its employees as a group, not as a broad-based tort action between the railroad and an individual employee. Indeed, the RLA is a comprehensive legislative scheme to resolve labor disputes in the railroad industry. *Buell*, 480 U.S. at 562; *see also Melanson v. United Air Lines*, 931 F.2d 558, 561 (9th Cir.), *cert. denied*, 112 S. Ct. 189 (1991); *cf. Holliday v.*

Consolidated Rail Corp., 914 F.2d 421, 424 (3d Cir. 1990) ("As work rules and working conditions represent issues that are at the heart of labor-management negotiations, the court will not upset the delicate balance of the collective bargaining agreement absent a . . . compelling reason."), *cert. denied*, 498 U.S. 1090 (1991).[10]

The court of appeals in *Gottshall* and *Carlisle*, however, created a cause of action that in effect transfers the responsibility for establishing working conditions from the arena of employee-management negotiation, dispute resolution, and collective bargaining to private lawsuits between individual employees and the employer. It ignored the availability of the RLA to employees subjected to stressful working conditions and developed an expansive test of liability that inevitably will encroach upon matters that Congress committed to the RLA.

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[10] Both before and after *Buell*, the lower federal courts have observed the "somewhat blurry line between the RLA and the FELA." *Kulavic v. Chicago & Illinois Midland Ry.*, 1 F.3d 507, 520 (7th Cir. 1993) (Flaum, J., concurring); *see also Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1051 (7th Cir. 1983) (noting the tension between the FELA and the RLA), *cert. denied*, 465 U.S. 1007 (1984); *Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281, 1288 n.5 (9th Cir. 1986) (considering the preclusive effect of the RLA as "critical in determining the scope of the FELA's coverage"); *Feldleit v. Long Island R.R.*, 723 F. Supp. 892, 900-01 (E.D.N.Y. 1989). Given the undeniable interaction between the two statutes, "where the RLA is involved, there is good reason to construe the FELA to exclude non-physical injuries of the kind claimed here as a predicate for emotional harm." *Milam v. Herrlin*, 819 F. Supp. 295, 303 (S.D.N.Y. 1993).

C. The Court of Appeals' Expansive Test Allows a Broader Recovery for Negligent Infliction of Emotional Distress Under the FELA Than That Allowed by Any Other Court of Appeals to Have Considered the Issue.

Since this Court's decision in *Buell*, every court of appeals to have addressed the question of what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the FELA – with the exception of the court of appeals in *Gottshall* and *Carlisle* – has placed limits on such claims consistent with the FELA and the common law.

Some courts of appeals have required the plaintiff to have experienced a physical impact or to be in the zone of danger of a physical impact. *See, e.g., Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 914 (1992); *Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95, 96 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989); *see also Plaisance v. Texaco, Inc.*, 966 F.2d 166, 168-69 (5th Cir.) (*en banc*), *cert. denied*, 113 S. Ct. 604 (1992); *Gaston*, 866 F.2d at 819-20.[11]

Other courts of appeals have avoided the issue of the legal standard to be applied in determining what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the FELA by holding that on the facts of the particular case the emotional injury resulting from ordinary working conditions was not actionable. *See, e.g., Moody v. Maine Cent. R.R.*, 823 F.2d 693, 694 (1st Cir. 1987) ("We see the *Buell* opinion [as] an attempt to leave the door to recovery for emotional injury somewhat ajar but not by any means wide open"); *see also Puthe*, 2 F.3d at 483; *Stoklosa*, 864 F.2d at 426; *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987).

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[11] Prior to its decisions in *Gottshall* and *Carlisle*, the Court of Appeals for the Third Circuit also appeared to favor the zone of danger test for negligent infliction of emotional distress under the FELA. *See Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 970 (1991); *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir. 1991).

Yet other courts of appeals, relying on the language in *Buell* with regard to "severe emotional injury" and "unconscionable abuse," *Buell*, 480 U.S. at 566 n.13, have imposed significant limitations on recovery for claims of negligent infliction of emotional distress under the FELA by requiring "outrageous" or "unconscionable" conduct. *See, e.g., Elliot*, 910 F.2d at 1229; *Adams*, 899 F.2d at 539-40.[12]

* * *

In sum, the broad remedial policy of the FELA does not justify allowing recovery under the FELA for every "genuine," "foreseeable" emotional injury. To the contrary, as discussed below, both the policies of the FELA and those of the common law accord with limiting recovery for negligent infliction of emotional distress under the FELA to circumstances in which the plaintiff experiences a physical impact or reasonably fears the threat of physical impact.

II. LIMITING RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER THE FELA TO SITUATIONS IN WHICH THE PLAINTIFF EXPERIENCES A PHYSICAL IMPACT OR REASONABLY FEARS THE THREAT OF A PHYSICAL IMPACT STRIKES THE MOST APPROPRIATE BALANCE AMONG THE VARIOUS POLICIES AND INTERESTS AT STAKE.

As discussed *supra* pp. 20-21, because emotional distress claims are different from tort claims involving only physical injury, the common law imposes one of the following three threshold requirements on recovery for negligent infliction of emotional distress: (1) that the plaintiff experience an actual physical impact; (2) that the plaintiff either experience an actual physical impact or reasonably fear the threat of being in the zone of danger of an actual physical impact; or (3) that the plaintiff contemporaneously witness harm to an immediate family member.[13] Although any one of these three standards is preferable to the unlimited foreseeability test adopted by the court of appeals in these cases, the zone of danger test strikes the most appropriate balance among the various policies at issue and is the fairest and most workable of the common law tests.

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[12] It is not clear what limits the Court of Appeals for the Ninth Circuit, the final court of appeals to have discussed the FELA negligent infliction of emotional distress issue, would place on such cause of action. While the Ninth Circuit Court of Appeals has acknowledged that FELA claims for mental injuries are compensable, it has not delineated the specific circumstances under which the recovery of damages is permitted. *See Taylor v. Burlington N. R.R.*, 787 F.2d 1309, 1313 (9th Cir. 1986); *see also Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1372 n.2 (9th Cir. 1987).

[13] Once one of these threshold requirements is met, the general physical injury tort requirements of breach of duty, injury, and causation still must be satisfied. In the emotional distress context, "injury" includes some objective physical manifestation of the emotional distress. *See* Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781, 796-99 (1988).

A. The Zone of Danger Test Is the Common Law Test That Is Most Consistent With the FELA.

While the FELA speaks in general terms, and leaves room for interpretation by the courts, *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958), it nonetheless represents a careful balance between modified common law doctrines and new statutory remedies. Congress granted remedies under the FELA to certain classes of workers while modifying several traditional common law doctrines, including the fellow servant rule, contributory negligence, assumption of risk, and contractual waiver of liability. *See* 45 U.S.C. §§ 51, 53-55; *see also* H.R. Rep. No. 1386, 60th Cong., 1st Sess. 1 (1908); R. Dahlquist, *Punitive Damages Under the Jones Act*, 6 Mar. Law. 1, 32 (1981) (citing W. Prosser, *The Law of Torts* 535-36 (4th ed. 1971)).

Any standard for negligent infliction of emotional distress claims should not upset this balance. This Court long has recognized the problems inherent in dealing with remedial statutory schemes in which Congress has balanced the interests of employees, employers, and the public. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), a decision concerning a claim for contribution among joint tortfeasors under the Longshoremen's and Harbor Workers' Act, this Court "took cognizance of the apparent trade-off in the Act between the employer's limitation of liability and the abrogation, in favor of the employee, of common-law doctrines of

contributory negligence and assumption of risk." *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 112 (1974) (discussing *Halcyon*). The Court refrained from allowing contribution because "any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers." *Id.*; *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990).

Any cause of action for negligent infliction of emotional distress must be consistent with the congressional scheme of the FELA.[14] In this respect, the common law zone of danger test – the middle-ground test – is the most appropriate.

In contrast to the expansive approach adopted by the court of appeals, which is completely divorced from the congressional concern with physical injury and death, the common law zone of danger test – with its requirement of physical impact or a reasonable fear of the threat of physical impact – is most consistent with Congress' concern with physical injury. *See Lancaster*, 773 F.2d at 813 (adopting zone of danger test because of FELA's concern "with the security of the person from physical invasions or menaces"), *cert. denied*, 480 U.S. 945 (1987).

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[14] Caution is especially in order before the balance is upset, given that Congress has considered repeal or amendment of the FELA. *See Hearings on the Federal Employers' Liability Act Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989); *see also* 136 Cong. Rec. S15553 (daily ed. Oct. 17, 1990) (proposed legislation to repeal FELA and place the railroad industry under the jurisdiction of state workers' compensation systems); 136 Cong. Rec. H10104 (daily ed. Oct. 17, 1990) (same).

A zone of danger test also is consistent with the realities of the railroad industry. As discussed, *supra* pp. 18-19, the railroad industry, like the shipping industry, by its very nature is a rigorous, physically demanding, round-the-clock, all-weather industry – not for the "faint-hearted." *Gaston*, 866 F.2d at 820. The court of appeals' test improperly permits a cause of action for the ordinary stresses of a railroad worker's chosen career, whereas the zone of danger test does not. Moreover, as discussed, *supra* pp. 27-30, the workers subjected to stress from ordinary working conditions are not without remedy. They have available to them the comprehensive arbitration and collective bargaining system of the RLA as the more appropriate forum to address working conditions that give rise to stress.

On the other hand, when a railroad worker experiences a physical impact or reasonably fears the threat of a physical impact, the zone of danger test permits a recovery. It thus provides the necessary link between the type of physical injury contemplated by Congress in enacting the FELA, the legislative system embodied in the RLA, and the development of the tort of negligent infliction of emotional distress at common law.

The experience of the Court of Appeals for the Fifth Circuit is instructive. In *Gaston*, 866 F.2d at 817, the court affirmed the dismissal of Gaston's negligent infliction of emotional distress claim based on having witnessed the violent death of his half-brother. While recognizing the tragic quality of Gaston's experience, it concluded that to allow recovery for emotional distress to a bystander not himself physically endangered by the traumatic event

would randomly and incalculably expand liability without any corresponding increase in safety because damages would be measured by:

> factors which are entirely incidental to the operation of the train or vessel and which bear little or no relationship to the safety of that venture – factors such as how many crew members happen to be standing around to observe an incident, whether their vision is obscured by darkness or weather, how close they are to the occurrence, and the like. Because they are irrelevant to that operation, visiting exponential damages on an employer on the basis of such factors is not only random and wayward, but serves in no way to advance the major subsidiary purpose of affording such remedies as those of the FELA/Jones Act to trainmen and seamen: to hold out incentives to their employers to reduce dangers and operate safely.

Gaston, 866 F.2d at 820.

In *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991), *on rehearing*, 966 F.2d 166 (5th Cir.) (*en banc*), *cert. denied*, 113 S. Ct. 604 (1992), an experienced tugboat captain who witnessed an explosion when a barge ruptured a pipeline brought suit under the Jones Act for emotional distress. The panel adopted what it termed a "full recovery" approach – similar to the approach taken in *Gottshall* and *Carlisle* – that would permit a plaintiff to recover for negligent infliction of emotional distress if a reasonable person, normally constituted, would not have been able to cope adequately with the mental distress arising from the circumstances. *Plaisance*, 937 F.2d at 1010. The panel denied recovery to the particular plaintiff, however. *Id.* at 1011.

On rehearing, the *en banc* court concluded that because the plaintiff's claim was not cognizable under even the most liberal "full recovery" theory, the panel should not have reached the issue of whether foreseeability alone could support a recovery for negligent infliction of emotional distress. *Plaisance*, 966 F.2d at 168. Significantly, the *en banc* court emphasized that *Gaston*, with its suggestion that the zone of danger test is the appropriate test for negligent infliction of emotional distress, remained the law of the circuit. *Id.* at 169.

Thus, as the Fifth Circuit's experience illustrates, FELA policy most accords with limiting recovery for negligent infliction of emotional distress to situations in which the plaintiff either experiences a physical impact or reasonably fears the threat of a physical impact. As discussed below, the development of the common law supports the same result.

B. The Development of the Common Law Demonstrates That the Zone of Danger Test Is the Fairest and Most Workable of the Common Law Tests.

At common law, the zone of danger test is the most workable approach to the recovery of damages for negligent infliction of emotional distress. No other approach has proven to be as fair, as administratively efficient, or as consistent in application.

Although the physical impact test may best recognize Congress' original concern with the physical dangers of railroad employment, that test generally has been abandoned at common law in recognition that a near miss may be as frightening as an actual impact. *See* Appendix to Brief (citing only six states that retain the impact rule).

At the other end of the common law spectrum, the bystander test not only is particularly ill-suited to the railroad context, but also has proven to be arbitrary and unworkable. In *Dillon v. Legg*, 68 Cal. 2d 728, 741, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968), the Supreme Court of California held that a mother could recover for the emotional distress of witnessing injury to her child because an emotional injury to the mother from such an event was reasonably foreseeable. The court suggested three guidelines for future cases in gauging the boundaries of foreseeability as a limit on a defendant's duty: (1) whether the plaintiff was located near the scene of the accident, or was a distance away from it; (2) whether the shock resulted from a direct emotional impact upon the plaintiff caused by sensory and contemporaneous observation of the accident, as opposed to learning of the accident from others after its occurrence; and (3) whether the plaintiff and the victim were closely related, or were either unrelated or only distantly related. *Dillon*, 68 Cal.2d at 790-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

In the years following *Dillon*, realizing that the three factors enumerated in *Dillon* in no way encompass all situations in which emotional distress is foreseeable, the California courts relaxed the *Dillon* requirements. *See, e.g., Ledger v. Tippitt*, 164 Cal. App. 3d 625, 646, 210 Cal. Rptr. 814, 826 (1985) (abandoning requirement of blood or marital relationship to allow recovery for negligent infliction of emotional distress to unmarried co-habitant); *Archibald v. Braverman*, 275 Cal. App. 2d 253, 255, 79 Cal. Rptr. 723, 724-25 (1969) (allowing mother who arrived after injury-producing event occurred to recover for emotional distress).

In 1989, however, the Supreme Court of California recognized that the California decisions were leading to a situation of unlimited liability – " 'foreseeability is endless because . . . like light, [it] travels indefinitely in a vacuum.' " *Thing v. La Chusa*, 48 Cal. 3d 644, 659, 771 P.2d 814, 823, 257 Cal. Rptr. 865, 874 (1989) (quoting *Newton v. Kaiser Foundation Hosps.*, 184 Cal. App. 3d 386, 391, 228 Cal. Rptr. 890, 893 (1986)). To limit a defendant's liability, the *Thing* court instructed the lower courts to impose *Dillon's* requirements strictly – even if arbitrarily – and noted that "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Thing*, 48 Cal. 3d at 668, 771 P.2d at 829-830, 257 Cal. Rptr. at 881.[15]

Indeed, as the Supreme Court of New York explained in adopting the zone of danger test instead of the relative bystander approach endorsed in *Dillon*:

> [W]hichever way one turns in permitting a theory of recovery one is entangled in the inevitable ramifications which will not stay defined or limited. There are too many factors and each too relative to permit creation of only a limited scope of liability or duty.
>
> . . . Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.

Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969).

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[15] Like California, other state courts that have moved towards a general foreseeability test subsequently have retreated from that approach. *See, e.g.*, *Cameron v. Pepin*, 610 A.2d 279 (Me. 1992); *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 787 P.2d 553 (1990).

Thus, the development of the common law teaches that tests based on foreseeability, such as the bystander test, inevitably lead to potentially unlimited and irrational liability for the defendant. Even for plaintiffs, foreseeability tests prove to be as arbitrary as any other common law test. As demonstrated by the experience of Hawaii, which adopted a general foreseeability test, *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970), there always will be situations in which emotional harm is foreseeable, but the court nonetheless must step in to limit liability. *See, e.g.*, *Kelley v. Kokua Sales & Supply Ltd.*, 56 Haw. 204, 208, 532 P.2d 673, 676 (1975) (denying recovery to plaintiff where emotional injury was serious and foreseeable but so far removed from the injury-producing event that "[w]ithout a reasonable and proper limitation of the scope of the duty of care owed by" defendants, defendants "would be confronted with an unmanageable, unbearable and totally unpredictable liability").

The zone of danger test best reconciles the interests of emotionally injured plaintiffs, defendants, and judicial efficiency. It is also fairer than a bystander or foreseeability test because it recognizes that the principal purpose of a negligence analysis is to avoid the imposition of liability out of all proportion to a defendant's fault. *See, e.g.*, *Williams v. Baker*, 572 A.2d 1062, 1072 (D.C. 1990); *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 554, 457 N.E.2d 1, 4, 75 Ill. Dec. 211, 214 (1983); *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980).

Moreover, the zone of danger test is consistent with an underlying premise of the negligence system that it is both meaningless and unfair to impose liability when the defendant could not have taken precautions to avoid injury. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Although foreseeability may be a good indicator of the need for precautions in cases involving tangible physical injury, it is a very poor indicator with respect to intangible emotional injuries where it is impossible for the defendant to estimate possible injuries and make any assessment of damages. *See* Pearson, *Liability to Bystanders for Negligently Inflected Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 507 (1982). As a result, it is unlikely that the imposition of a duty to protect against foreseeable emotional distress would have any effect in deterring dangerous and unsafe conduct. *Cf. Gaston*, 866 F.2d at 820 (the random effects of imposing bystander liability in the context of the FELA would in no way advance railroad safety).

C. Neither Gottshall Nor Carlisle Has a Compensable Injury Under the FELA Because Neither Experienced a Physical Impact or Reasonably Feared the Threat of a Physical Impact.

In these cases, neither Gottshall nor Carlisle falls within the contours of liability for negligent infliction of emotional distress as those contours should be drawn under the FELA.

Even if it is assumed that Gottshall's emotional distress is genuine and is a foreseeable consequence of the circumstances surrounding John's death, Gottshall himself suffered no physical impact from those circumstances nor was he in danger of any physical impact. Laboring alongside a colleague who suffers a heart attack while working under time pressure on an unusually hot day simply does not trigger liability under a zone of danger analysis. Nor should it state a cause of action under the FELA.

Similarly, even if it is assumed that Carlisle's emotional distress is genuine and is a foreseeable consequence of his working conditions, Carlisle suffered no physical impact and was not within the zone of danger of any physical impact. General stress resulting from long hours, a difficult and demanding job, and unsophisticated office equipment also does not trigger liability under a zone of danger analysis. It, too, should not state a cause of action under the FELA.

Application of the zone of danger test admittedly means that some employees who suffer genuine emotional distress, like Gottshall and Carlisle, may not be able to recover under the FELA. On the other hand, for all the reasons discussed in this Brief, limiting recovery for negligent infliction of emotional distress to situations in which the plaintiff experiences a physical impact or reasonably fears the threat of a physical impact strikes the most appropriate balance among the various policies and interests at stake.

CONCLUSION

For the foregoing reasons, petitioner Consolidated Rail Corporation respectfully requests that, as to *Consolidated Rail Corporation v. Gottshall*, this Court reverse the judgment of the Court of Appeals for the Third Circuit and remand with instructions to affirm the district court's entry of summary judgment for Conrail; and, as to *Consolidated Rail Corp. v. Carlisle*, this Court reverse the judgment of the Court of Appeals for the Third Circuit and remand with instructions for the court of appeals to remand to the district court with instructions to enter judgment as a matter of law for Conrail.

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Dated: November 26, 1993

APPENDIX

Common Law Negligent Infliction of Emotional Distress Cases

The following is a compilation of the states' common law tests for negligent infliction of emotional distress. Note that in most instances the states that have adopted the more expansive tests also apply the more restrictive tests in appropriate circumstances. For example, many of the states that allow recovery under the bystander test also allow recovery under the zone of danger test.

Physical Impact Test

Georgia: *OB-GYN Assocs., P.C. v. Littleton*, 259 Ga. 663, 386 S.E.2d 146 (1989).

Indiana: *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991).

Kansas: *Bowman v. Doherty*, 235 Kan. 870, 686 P.2d 112 (1984).

Kentucky: *Mitchell v. Hadl*, 816 S.W.2d 183 (Ky. 1991).

Oregon: *Hammond v. Central Lane Communications Ctr.*, 312 Or. 17, 816 P.2d 593 (1991).

Tennessee: *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982).

Zone of Danger Test

Arizona: *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979).

Colorado: *Towns v. Anderson,* 195 Colo. 517, 579 P.2d 1163 (1978).

Delaware: *Robb v. Pennsylvania R.R.,* 210 A.2d 709 (Del. 1965).

District of Columbia: *Williams v. Baker,* 572 A.2d 1062 (D.C. 1990).

Illinois: *Rickey v. Chicago Transit Auth.,* 98 Ill. 2d 546, 457 N.E.2d 1, 75 Ill. Dec. 211 (1983).

Maryland: *Resavage v. Davies,* 199 Md. 479, 86 A.2d 879 (1952).

Minnesota: *Garvis v. Employers Mut. Casualty Co.,* 497 N.W.2d 254 (Minn. 1993).

Missouri: *Asaro v. Cardinal Glennon Memorial Hosp.,* 799 S.W.2d 595 (Mo. 1990).

New York: *Tobin v. Grossman,* 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

North Dakota: *Whetham v. Bismarck Hosp.,* 197 N.W.2d 678 (1972).

Utah: *Boucher v. Dixie Medical Ctr.,* 850 P.2d 1179 (Utah 1992).

Vermont: *Jobin v. McQuillen,* 609 A.2d 990 (Vt. 1992).

Wisconsin: *Garrett v. City of New Berlin,* 122 Wis. 2d 223, 362 N.W.2d 137 (1985).

Bystander Test

Alaska: *Croft v. Wicker,* 737 P.2d 789 (Alaska 1987).

California: *Dillon v. Legg,* 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

Florida: *Champion v. Gray,* 478 So. 2d 17 (Fla. 1985).

Iowa: *Fineran v. Pickett,* 465 N.W.2d 662 (Iowa 1991).

Louisiana: *Lejeune v. Rayne Branch Hosp.,* 556 So. 2d 559 (La. 1990).

Maine: *Cameron v. Pepin,* 610 A.2d 279 (Me. 1992).

Massachusetts: *Stockdale v. Bird & Son, Inc.,* 399 Mass. 249, 503 N.E.2d 951 (1987).

Michigan: *Nugent v. Bauermeister,* 195 Mich. App. 158, 489 N.W.2d 148 (1992), *appeal denied,* 503 N.W.2d 904 (1993).

Mississippi: *Entex, Inc. v. McGuire,* 414 So. 2d 437 (Miss. 1982).

Montana: *Maguire v. State,* 254 Mont. 178, 835 P.2d 755 (1992).

Nebraska: *James v. Lieb,* 221 Neb. 47, 375 N.W.2d 109 (1985).

Nevada: *Buck v. Greyhound Lines,* 105 Nev. 756, 783 P.2d 437 (1989).

New Hampshire: *Wilder v. City of Keene,* 131 N.H. 599, 557 A.2d 636 (1989).

New Jersey: *Frame v. Kothari,* 115 N.J. 638, 560 A.2d 676 (1989).

New Mexico: *Folz v. State*, 110 N.M. 457, 797 P.2d 246 (1990).

North Carolina: *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 395 S.E.2d 85 (1990).

Ohio: *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

Pennsylvania: *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979).

Rhode Island: *Reilly v. United States*, 547 A.2d 894 (R.I. 1988).

South Carolina: *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985).

Texas: *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

Washington: *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 787 P.2d 553 (1990).

West Virginia: *Heldreth v. Marrs*, 425 S.E.2d 157 (W. Va. 1992).

Wyoming: *Contreras v. Carbon County School Dist. No. 1*, 843 P.2d 589 (Wyo. 1992).

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In The

Supreme Court of the United States

October Term, 1993

◆

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

◆

BRIEF FOR RESPONDENT JAMES E. GOTTSHALL

◆

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QUESTIONS PRESENTED

1. Did the court of appeals properly base its decision upon an exacting scrutiny of the circumstances guided by common law developments as gauged by the FELA?

PARTIES TO THE PROCEEDING

This matter involves two cases on writ of certiorari to the United States Court of Appeals for the Third Circuit. The parties to *Gottshall v. Consolidated Rail Corporation*, in respect of which this Brief is submitted, are petitioner Consolidated Rail Corporation, a publicly-held corporation, and respondent James E. Gottshall, an adult citizen and resident of the Commonwealth of Pennsylvania. Petitioner is the defendant in the district court and was the unsuccessful appellee in the court of appeals. Respondent is the plaintiff in the district court and was the successful appellant in the court of appeals.

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STATEMENT OF THE CASE

The court of appeals based its decision in *Gottshall* primarily upon an exacting scrutiny of the facts. The court of appeals found that an exacting scrutiny of the facts as they bear upon an employer's duty to provide a safe workplace, the nature of the alleged tortious conduct, the injury and the underlying equities was the best way to reconcile the FELA's remedial purpose of providing recovery to injured workers with the restrictive function of state common law emotional injury tests and obtain a threshold assurance that emotional injury claims brought pursuant to the FELA involve genuine and serious emotional injury. Because respondent seeks this Court to sustain the fact-intensive approach adopted by the court of appeals, consistent with this Court's opinion in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987),[1] rather than to impose any particular state common law test upon the FELA or to promulgate some other "bright line" rule, respondent includes the ensuing detailed discussion of the factual background of this case, as set forth in the opinion of the court of appeals.[2] Under a fact-intensive approach, a detailed review of the facts would seem to be required by Supreme Court Rule 24.1(g), calling for the inclusion herein of "all that is material to the consideration of the questions presented."

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[1] In *Buell*, this Court indicated that, "whether 'emotional injury' is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case." 480 U.S. at 568.

[2] References to the opinion of the court of appeals are cited to the appendix submitted by petitioner in support of the petition for certiorari (hereinafter designated as "A-___"). References to the joint appendix submitted to the court of appeals by the parties in *Gottshall* are herein designated as "GA-___." References to the parties' joint appendix to this Court are hereinafter designated as "JA-___."

A thorough scrutiny of the facts involved in *Gottshall* reveals the convergence of numerous circumstances which, taken together, demonstrate the seriousness of respondent's emotional injuries and the genuineness of their causal connection to petitioner's negligence. By way of summary, these circumstances include: (i) petitioner's forcing respondent and his co-workers to perform heavy physical labor at an accelerated pace, without breaks, in the midst of a record heat wave; (ii) petitioner's failure to provide emergency communications access; (iii) the advanced ages and poor physical conditioning of most of the men; (iv) the resulting death and collapse of one of respondent's co-workers and close friends, Richard Johns; (v) respondent's intimate and active involvement with Mr. Johns' death; (vi) petitioner's forcing respondent back to work under the same conditions that had killed Mr. Johns, while Mr. Johns' body laid in open view on the ground; (vii) respondent's subsequent emotional collapse and psychiatric institutionalization for major depression and severe post-traumatic stress disorder with attendant physical injuries including forty-pound weight loss, nausea, cold sweats, suicidal preoccupation and sleep onset insomnia.

The first component of the atypically severe working conditions to which petitioner subjected respondent and his co-workers was the weather. The day in question occurred during one of the worst heat waves in recent memory. Respondent's boss, Track Supervisor William Yetter, admitted to being unable to recall a spell which had been so hot for so long since the 1940's (A-47). As accurately summarized by the court of appeals, "[o]n the day of the accident, the temperature was hovering at 97 degrees; it was very humid; the sun was shining; the field was in the open; and work started at high noon" (A-49). As a result of these conditions, the workers were apprehensive, and they complained repeatedly to their supervisors (GA-00059, 64, 68).

That the weather conditions were serious enough to warrant special care is admitted by petitioner. Dr. David Deubner, petitioner's Chief Medical Officer stated that under such conditions, "[i]f people are doing very heavy cardiovascular labor, then it should be slowed down and have longer work breaks, more frequently longer breaks when it gets very hot and humid . . . that's why when the sun gets too high, you recommend slowing down and having more rest" (A-47 to A-48).[3]

Contrary to Conrail's policy of slowing down in the face of extreme weather conditions, respondent's supervisors actually accelerated the pace of the work and, to make matters worse, disallowed scheduled work breaks and discouraged unscheduled breaks (A-3). Importantly, all of these actions were in contrast to the usual working conditions to which respondent and his co-workers were normally subjected. As stated by the court of appeals,

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[3] Dr. Deubner also advocated what he referred to as an employee's "safe function capacity," which he explained as the matching of an employee's job to his physical health (A-48). The conditions faced by respondent and his co-workers on the date of the accident were a clear violation of this concept. The man who died for example, Mr. Johns, was 56 years old, significantly overweight, suffered from high blood pressure, athero or arteriosclerotic cardiovascular disease, and was taking medication (*id.*). Moreover, petitioner knew that many if not most of respondent's other co-workers were overweight and between fifty and sixty years of age. One of them had previously suffered a heart attack (*id.*).

"[t]here is . . . evidence that conditions that day were anything but 'ordinary,' much less characterized as 'negotiated circumstance' " (A-53). According to one of respondent's co-workers, "[t]he conditions at the Watsontown Secondary on the date of the accident were substantially more severe than the general working conditions associated with the job. The extreme heat and humidity, and the pace of the work, were unbearable" (*id.*). Another of respondent's co-workers that day attested that, "[w]orking on a division gang can be strenuous. However, the situation on the date of Mr. Johns' death, involving extreme heat, no breaks, no shade and being pushed very hard, was something different" (A-53 to A-54). As respondent himself described it, "[i]t was 97 degrees. It was hot and humid. They put us out there to change rails, push, push, push . . . I'm not an animal" (A-54).

After two and one half hours of continuous toil under these extreme conditions, Richard Johns, one of respondent's co-workers, and a close friend of fifteen years, collapsed. Though Mr. Johns was pale and sweating profusely, supervisor Michael Norvick neither took Mr. Johns from the worksite nor sought medical assistance. Indeed, Mr. Norvick ordered Mr. Johns' co-workers to stop assisting Mr. Johns and get back to work (A-3). About five minutes after they did so, respondent saw Mr. Johns collapse a second time. At that point, respondent rushed to Mr. Johns, where he confronted a gruesome sight: "Johns had turned white; his teeth had been knocked out by the fall; his eyes were rolled back; he was gasping for breath; his heart was fluttering; and saliva was drooling from his mouth" (*id.*). For the next forty-five minutes, respondent desperately administered cardiopulmonary resuscitation, during which he intermittently wept and urged Mr. Johns' to revive, repeating, "[c]ome on Dick, breathe, breathe" (A-5).[4]

While respondent tried to revive Mr. Johns, supervisor Norvick was busy speeding along old country roads searching for a place to telephone for help (A-4). Under normal circumstances, Mr. Norvick simply could have called on his Conrail communications equipment. On the date of Mr. Johns' death, however, the equipment was useless because petitioner had taken its Turbotville, Pennsylvania base station off the air for repairs, without telling anyone (*id.*). Eventually, Mr. Norvick was able to summon help and led a team of paramedics to the remote worksite. By then, it was too late for Mr. Johns.

As supervisor Norvick saw it, however, it was not too late to finish the job, and he ordered the men back to work. While respondent and the others endeavored to complete their task in the same weather conditions that had killed Mr. Johns, Mr. Johns' corpse laid in open view on the gravel beside the track and "bake[d] like a potato" (A-52, A-54). Even after the work was finished, Mr. Norvick required the men to remain at the worksite until the coroner arrived, which was not for a full three hours after Mr. Johns' death (A-52).[5]

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[4] Though supervisor Norvick had thought CPR training was a good idea because of the men's ages, and scheduled training sessions with the American Red Cross, petitioner's safety director had cancelled the sessions because of the "liability factor" (GA-00032 to GA-00033). Thus, Gottshall was the only person at the worksite who knew how to administer CPR.

[5] In affidavit, the coroner expressed his opinion that Mr. Johns died from a heart attack brought on by excessive heat and humidity in conjunction with heavy physical exertion. The coroner also opined that had Mr. Johns received prompt medical attention, his chances of survival would have been materially enhanced (GA-00072 to GA-00073).

The following day, when respondent reported to work, he was reprimanded for administering CPR to Mr. Johns and, along with his co-workers, sent back to work under the same extreme weather and working conditions that had killed Mr. Johns (A-5). During this time, respondent became increasingly afraid that he would die as had his friend, Mr. Johns. Respondent started feeling sick and lost his appetite (*id.*). A few days after Mr. Johns' funeral, respondent informed his supervisor he was sick and wanted to go home.

When respondent arrived home, he retreated into his basement, where he was found several days later by his father. Shortly afterward, respondent was admitted to the Northwestern Institute of Psychiatry (*id.*). He remained there for three weeks, during which time he was diagnosed as suffering from major depression and post-traumatic stress disorder. In addition to loosing forty pounds, respondent suffered suicidal preoccupations, anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares of the death scene and a fear of leaving his home. Since his discharge, respondent has continued to receive outpatient psychological treatment (*id.*).[6]

Respondent filed a complaint against petitioner with the United States District Court for the Eastern District of Pennsylvania, raising a claim of negligent infliction of emotional distress under the Federal Employers' Liability Act, 45 U.S.C. Section 51, *et seq*. The district court granted petitioner's motion for summary judgment (A-91 to A-105), primarily on the grounds that respondent failed

to satisfy the "zone of danger" test adopted by the Pennsylvania Supreme Court (A-97 to A-100). Inexplicably disregarding virtually the entire factual record relating to petitioner's negligence, the district court also found that respondent failed to satisfy the traditional common law tort elements of foreseeability and causation (A-100 to A-105).

The court of appeals reversed the district court (A-1 to A-72). Taking to heart this Court's pronouncements in *Buell*, the court of appeals reviewed in detail the circumstances surrounding respondent's emotional collapse. Recognizing the conflict between the restrictive state common law emotional injury tests and the remedial policy of the FELA, the court of appeals charged itself with reconciling the two bodies of law by, "discerning the trends and developments in common law and then gauging them according to the policy underlying FELA, for FELA is at issue here and creates the cause of action" (A-24). The court of appeals reasoned that the best way to promote the policies underlying both the FELA and the state common law tests was through an exacting scrutiny of the facts to determine whether a plaintiff's claim (i) had a "solid basis" in common law and (ii) satisfied traditional tort elements. Because Gottshall's claim met both burdens, the court of appeals reversed the district court.

SUMMARY OF THE ARGUMENT

The fundamental decision before this Court is whether the legal sufficiency of FELA emotional injury claims should be determined through an exacting scrutiny of the facts of each case or is to be dictated by the artificial restrictions of state common law. Respondent respectfully argues that the resolution of this decision lies in (i) the FELA's remedial goal of providing recovery to injured railroad workers and the broad wording of the Act and broader construction given the Act by this Court to accomplish that end, (ii) the restrictive function of the state common law tests, (iii) the repudiation of all but one of the policy justifications for the common law tests; and (iv) the inapplicability of the remaining policy justification – subjecting tortfeasors to "unlimited liability" – in the context of the FELA.

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[6] Respondent's claim does not represent one for wholly emotional injuries.

The FELA was enacted as an avowed departure from common law tort principles restricting recovery. The purpose of the FELA was to eliminate traditional defenses to tort liability and facilitate recovery for injured rail workers. To accomplish that end, Congress fashioned the FELA in the broadest possible terms and expanded the role of the jury in FELA cases. Consistent with Congress's objectives, this Court has construed the Act broadly, refusing to read restrictions into the FELA's language and showing its willingness to depart from common law principles when necessary to facilitate recovery under the Act.

Squarely contradicting the remedial goal of the FELA is the restrictive function of the various tests devised by state common law to "weed out" problematic emotional injury claims and prevent subjecting tortfeasors to potentially unlimited liability. Insofar as these tests operate to exclude whole categories of claims as a matter of law, they are offensive both to the remedial goal of the FELA and to the expanded role of FELA juries.

Recognizing (a) the "fundamental tension" between the FELA and the restrictive state law limitations (b) that "FELA liability is distinctly a federal question" and that the state law tests "do not necessarily etch the contours of the federal right," and (c) that the state law tests are arbitrary and provide only a "dubious method" of weeding out unmeritorious claims, the court of appeals properly declined to adopt or strictly apply any of the common law tests or otherwise to promulgate a "bright line" rule. Instead, the court of appeals looked to whether petitioner's claim had a "solid basis" in common law sufficient to provide a "threshold assurance" that petitioner suffered "genuine and serious emotional injury." The court of appeals then reviewed the factual record to determine if there was enough evidence to satisfy the traditional negligence elements of duty, breach of duty, causation and injury. The court of appeals concluded that, under the totality of the circumstances, petitioner is entitled to a trial on the merits.

Petitioner's arguments against the court of appeals' approach are unpersuasive. Initially, petitioner's position that the FELA does not permit recovery based upon a "bare showing that an injury is genuine and foreseeable" is premised upon a mischaracterization of the court of appeals' approach, which, as indicated above, involved a detailed examination of the factual record to determine not only the genuineness and foreseeability of respondent's injuries, but a determination whether respondent's claim was both solidly grounded in the common law of emotional injury as well as sufficient under traditional negligence requirements. Petitioner's second argument, that the FELA was meant to cover only physical injuries peculiar to the railroad, squarely contradicts the Act's broad language and construction, and identical arguments were long ago rejected by this Court.

Petitioner's request that this Court adopt the "zone of danger" test to protect the railroad's from "unlimited" "ruinous" and "random" liability demonstrates a fundamental failure to grasp the FELA's own express limitations on the class of potential plaintiff's in FELA emotional injury cases to such of a negligent carrier's *own employees* who can prove a *causal nexus* between their emotional injuries and their own jobs. Succinctly, the common law fear that "bystander" and other "foreseeability" tests will subject tortfeasors to claims by all manner of friend and relative of a physically injured victim simply cannot occur under the FELA.

Finally, the cries of petitioner and its *amici* that allowing railroaders to assert FELA claims for emotional injuries will expose the railroads to exponential damages, and the courts to an avalanche of cases alleging minor emotional upset, are unrealistic. Such arguments fail to consider (i) the diversity of psychological make-ups among railroad employees, (ii) FELA plaintiffs' burden of proving traditional negligence elements of duty, breach of duty, causation and injury, (iii) the minor awards juries would award for minor injuries, and (iv) the arbitration forum provided through the Railway Labor Act.

ARGUMENT

I. STATE COMMON LAW TESTS OPERATE IN CONFLICT WITH THE FELA

A. The FELA Is An Avowed Departure From Common Law Tort Principles Restricting Recovery

Because this matter involves the scope of a right created by federal statute, federal law controls the contours of that right. *See Urie v. Thompson*, 337 U.S. 163, 174 (1949).[7] Thus, it is necessary to look to the purposes, language and historical construction of the Federal Employers' Liability Act (the "FELA," or the "Act").

The FELA was intended as a departure from common law. *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 329 (1958) (FELA is "an avowed departure from the rules of common law"). Accordingly, this Court has indicated its displeasure at lower courts which failed "to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action"). *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 509-10 (1957).

As recently recognized by this Court, "[a] primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561 (1987). To achieve the Act's end of facilitating recovery in meritorious cases, Congress did not codify common law principles but fashioned the FELA in "the most general terms." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958). Stated otherwise, the Act was defined in language "as broad as could be framed." *Urie v. Thompson*, 337 U.S. at 181.

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[7] In *Urie*, the primary issue before this Court was whether the Act's coverage included causes of action for occupational diseases, such as silicosis, or was limited to injuries arising from discrete "accidents." Another issue before this Court was the correctness of the Missouri Supreme Court's holding that the plaintiff did not make out a case of negligence. On that issue, this Court recognized that,

> [w]hat constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes.

337 U.S. at 174.

> On its face, *every injury* suffered by any employee while employed by reason of the carrier's negligence was made compensable. *The wording was not restrictive as to* the employees covered; the cause of the injury, except that it must constitute negligence attributable to the carrier; or *the particular kind of injury resulting.*

Id. (emphasis added).

Consistent with the FELA's purpose and language, this Court has recognized the Act as a "broad remedial statute, and [has] adopted a 'standard of liberal construction in order to accomplish [Congress'] objects.' " *Buell*, 480 U.S. at 562, *quoting Urie v. Thompson*, 337 U.S. at 180. *See Kernan v. American Dredging*, 355 U.S. at 432, *citing Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957) ("the general congressional intent was to provide liberal recovery for injured workers"). Thus, this Court has viewed as inconsistent with the spirit of the FELA "nice distinctions in applying the Act's broad and general terms, or cutting down their full scope by inference or implication," *Urie v. Thompson*, 337 U.S. at 186. As stated in *Urie:*

> To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court.

337 U.S. at 181-2.

This Court also has recognized congressional intent in creating the Act to fashion a remedy that would not be "static," but which, "would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging*, 355 U.S. at 432. Thus, when called upon to

expand upon or depart from restrictive common law principles, this Court has done so. *See Urie v. Thompson* ("injury" as employed in the Act held to include occupational diseases); *Kernan v. American Dredging* (negligence per se extended beyond common law limits). *See also Rogers v. Missouri Pacific R. Co.*, 352 U.S. at 506 (recognizing the FELA's relaxed causation requirement). As this Court pointed out in Buell, although the Act's text mentions only negligent torts, it has been construed to cover certain intentional torts as well. 480 U.S. at 562, n.8.

The importance of the above-stated principles of FELA jurisprudence is that, although courts construing the FELA should "glean guidance" from common law developments, *Buell*, 480 U.S. at 568, they must not mechanically superimpose common law tests onto the FELA. As the court of appeals stated in *Gottshall:*

> In FELA cases, more so than common law negligence actions, we must curtail arbitrary line drawing so that the remedial and humanitarian goals of the statute can be fully implemented. To the extent doctrinal requirements of the common law encroach upon FELA policies and preclude remedies in meritorious cases, the common law must bow.

(A-39 to A-40).

B. The Purpose and Effect Of The State Common Law Tests Is To Restrict Claims

Precisely contrasting the FELA's aim of providing recovery to injured rail workers and the liberal construction given the Act by the courts to achieve that end is the restrictive panoply of common law emotional injury tests continuously being adopted, revised and then rejected by the state courts. Whereas the organizing principle of the FELA is to afford causes of action to injured claimants, the purpose of the state law tests is just the opposite. Whereas the FELA is, in essence, inclusionary, the common law tests are "based upon a theory that liability is the *extraordinary exception.*" Gottshall (A-11) (emphasis added).

The litany of concerns offered as necessitating the common law restrictions are well-known to the courts and commentators. Generally, they consist of the fears of (i) the potential for fraudulent claims; (ii) a "flood" of litigation; (iii) the inability of medical science to determine causation; and (iv) a reluctance to subject defendants to an unlimited class of remote and unforeseeable claimants. *See* Bell, *The Bell Tolls: Toward A Full Recovery For Psychic Injury,* 36 U. Fla. L. Rev. 333, 347 (1984) (hereinafter referred to as "Bell, *The Bell Tolls*"); *Niederman v. Brodsky,* 436 Pa. 401, 261 A.2d 84, 85 (1970). *See also Halko v. New Jersey Transit Rail Operations, Inc.,* 677 F. Supp. 135, 139 (S.D.N.Y. 1987), *quoting* Prosser & Keeton, *The Law of Torts,* Section 54 (5th Ed. 1984); *Bass v. Nooney Co.,* 646 S.W.2d 765, 769 (Mo. 1983) (*en banc*).

Tellingly, these concerns did not arise as enlightened jurists grappled with problems in handling emotional injury cases, but were articulated telescopically, before the courts had any experience with this type of claim. Thus, ninety-seven years ago, in the then landmark case in *Mitchell v. Rochester Railway Co.,* 151 N.Y. 107, 45 N.E. 354 (1896), adopting what has come to be known as the "physical impact" rule, the court *intuited* that:

> "[i]f the right of recovery in this class of cases[8] should be once established, it would naturally result in a flood of litigation in cases where the

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[8] In *Mitchell,* the plaintiff claimed to have been frightened and caused to suffer a miscarriage when a horse-drawn buggy almost struck her.

> injury complained of may be easily feigned without detection, and where damages must rest upon mere conjecture or speculation. . . . To establish such a doctrine would be contrary to principles of public policy."

45 N.E. at 354-55. See Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitations Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress,* 33 Vill. L. Rev. 781, 784 (1988) (hereinafter, "Comment, *Jurisdictional Survey.*").[9]

Consistent with the spontaneous generation of an underlying policy basis, the case law in this area did not develop in a principled fashion. Instead, the courts began with a "bright line" rule barring claims for emotional injury unaccompanied by physical impact from which they were forced into an odyssey of limited retreats as they were faced with new fact patterns. *Leong v. Takasaki,* 55 Haw. 398, 520 P.2d 758, 762 (1974); *Dillon v. Legg,* 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912, 924-5 (1968); *Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A.,* 327 N.C. 283, 395 S.E.2d 85, 88 (1990) ("The tort of negligent infliction of emotional distress apparently has a long and winding history in every state"); Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong,* 64 A.L.R.2d 100, 103 (1959). As stated in *Leong v. Takasaki:*

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[9] *Mitchell* was one of the first cases adopting the impact rule in the United States, along with *Spade v. Lynn & Boston R. Co.,* 168 Mass. 285, 47 N.E. 88 (1897). The rule is credited with having been developed in England, in *Victorian Railways Commissioners v. Coultas,* 13 App.Cas 222 (P.C. 1888), though it was overruled there only thirteen years later in *Dulieu v. White & Sons,* 2 K.B. 669 (1901). *See Bass v. Nooney Co.,* 646 S.W.2d 765, 768 (Mo. 1983) (*en banc*); *Hughes v. Moore,* 214 Va. 27, 197 S.E.2d 214, 217, n.2 (1973).

> A survey of cases . . . does not show the development of a logical and consistent rule, but reveals that the trend is a hesitant abandonment of . . . artificial restrictions and barriers to recovery in favor of a greater reliance on general tort law principles and the contemporary sophistication of the medical profession to test the veracity of claims for relief.

520 P.2d at 762. Pennsylvania, California and Washington appear to be good examples of this process. *See Gottshall* (A-60 to A-61, n. 8); *Dillon v. Legg*, 441 P.2d at 924-5; *Hunsley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096, 1101-02 (1976).

Although the policy considerations purportedly underlying the state law tests have been soundly discredited by the commentators and courts alike, as will be discussed in detail below, virtually all of the state courts remain obsessed with drawing, erasing and then re-drawing artificial lines in the sand as their preferred method of excluding potentially troublesome claims. The unfortunate effect of the state courts tests is to exclude many genuine claims of serious emotional injury. The "physical impact" rule, for example, is underinclusive of whole categories of meritorious claims now recognized by most states, including "bystander" and "zone of danger" claims.

In addition to being underinclusive, the impact rule has been criticized as irrational because the physical "impact" separating allowed from disallowed claims for emotional injury was often trivial and not causally related to the claimed emotional injury, and therefore provided a dubious guarantee of the emotional injury's genuineness:

> "Apart from some quite untenable notions of causal connection, the theory seems to be that the 'impact' affords the desired guarantee that the mental disturbance is genuine. But the same courts have found 'impact' in minor contacts with the person which play no part in causing the real harm, and in themselves can have no importance whatever. 'Impact' has meant a slight blow, a trifling burn or electric shock, a trivial jolt or jar, a forcible seating on the floor, dust in the eye or the inhalation of smoke. . . . 'The magic formula "impact" is pronounced; the door opens to the full joy of a complete recovery.' A Georgia circus case has reduced the whole matter to a complete absurdity by finding 'impact' where the defendant's horse 'evacuated his bowels' into the plaintiff's lap."

Daley v. La Croix, 384 Mich. 4, 179 N.W.2d 390, 394 & n.9 (1970), *quoting Prosser, The Law of Torts*, pp. 350-1 (3d ed.). *See also Johnson v. Rogers*, 763 P.2d 771, 780 (Utah 1988); *Robb v. Pennsylvania Railroad Co.*, 58 Del. 454, 210 A.2d 709, 714 (1965); *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A.2d 402, 405 (1941); *Williams v. Baker*, 572 A.2d 1062, 1067 (D.C. App. 1990); Comment, *Jurisdictional Survey 790-1* ("recovery is denied in cases involving severe and objectively verifiable psychic trauma, and is available for minor distress following a negligible impact").

Because of its under inclusiveness and irrationality, the impact rule has been abandoned by all but a handful of states. *Outten v. National Railroad Passenger Corporation*, 928 F.2d 74,78 (3d Cir. 1991), *citing* Comment, *Jurisdictional Survey* 792-3 & n. 59.[10]

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[10] Presently, the only states adhering to the physical impact rule are Arkansas, Georgia, Indiana, Kentucky, Kansas and Oregon. *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980); *OB-GYN Associates of Albany v. Littleton*, 259 Ga. 663, 386 S.E.2d 146 (1989); *Comfax Corp. v. North American Van Lines, Inc.*, 587 N.E.2d 118 (Ind. Ct. App. 1992); *Wishard Memorial Hospital v. Logwood*, 512 N.E.2d 1126 (Ind. Ct. App. 1987); *Anderson v.*

As a somewhat less restrictive substitute for the physical impact requirement, fourteen jurisdictions have adopted the "zone of danger" test. *Rowland v. Union Hills Country Club*, 157 Ariz. 301, 757 P.2d 105 (Ct. App. 1988); *Kimelman v. City of Colorado Springs*, 775 P.2d 51 (Colo. Ct. App. 1988), *cert. denied*, 493 U.S. 981 (1989); *Robb v. Pennsylvania Railroad*, 58 Del. 454, 210 A.2d 709 (1965); *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990); *Rickey v. Chicago Transit Authority*, 98 Ill.2d 546, 457 N.E.2d 1 (1983); *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952); *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980); *Asaro v. Cardinal Glennon Memorial Hospital*, 799 S.W.2d 595 (Mo. 1990) (*en banc*); *Jensen v. L.C. Whitford Co., Inc.*, 167 A.D. 826, 562 N.Y.S.2d 317 (1990); *Whetham v. Bismarck Hospital*, 197 N.W.2d 678 (N.D. 1972); *Shelton v. Russel Pipe and Foundry Co.*, 570 S.W.2d 861 (Tenn. 1978); *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992); *Jobin v. McQuillen*, 158 Vt. 322, 609 A.2d 990 (1992); *Estate of Wells v. Mount Sinai Medical Center*, 174 Wis.2d 503, 497 N.W.2d 779 (Ct. App. 1993).

Like the physical impact requirement before it, the zone of danger test has been widely-criticized as arbitrarily exclusionary of meritorious cases involving serious and foreseeable injuries. *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 436 (Me. 1982) (the rule "bars claims by reasonably foreseeable plaintiffs regardless of the authenticity and severity of the injury"); *Dzionkonski v. Babineau*, 375 Mass. 555, 564, 380 N.E.2d 1295, 1300 (1978) ("Although the zone of danger rule . . . provides a means of limiting the scope of . . . liability, it lacks strong logical support"); *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759, 763 (1983) ("We view the 'zone of danger' rule as being unduly restrictive"); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300, 306 (1979) (citing numerous cases criticizing rule); *Heldreth v. Marrs*, 188 W.Va. 481, 425 S.E.2d 157, 169 (1992) (rejecting the zone of danger rule as "restrictive and harsh").

Because of the arbitrary restrictiveness of the zone of danger test, virtually half of the states have rejected it in favor of the "bystander rule," allowing recovery to bystanders outside the zone of danger who witness traumatic events. These states are Alaska, California, Florida, Hawaii, Iowa, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, West Virginia and Wyoming. *Croft v. Wicker*, 737 P.2d 789 (Alaska 1987); *Dillon v. Legg, supra; Reynolds v. State Farm Mutual Automobile Ins. Co.*, 611 So.2d 1294 (Fla. Dist. Ct. App. 1992); *Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566 (1989), *recons. denied*, 71 Haw. 664, 833 P.2d 899 (1989); *Mills v. Guthrie County Rural Electric Cooperative Association*, 454 N.W.2d 846 (Iowa 1990); *Lejune v. Rayne Branch Hospital*, 556 So.2d 559 (La. 1990); *Culbert v. Sampson's Supermarkets, Inc., supra; Dzionkonski v. Babineau, supra; Nugent v. Bauermeister*, 195 Mich. App. 158, 489 N.W.2d 148 (1992), *appeal denied*, 503 N.W.2d 904 (1993); *Entex, Inc. v. McGuire*, 414 So.2d 437 (Miss. 1982); *Maguire v. State*, 254 Mont. 178, 835 P.2d 755 (1992); *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992); *State v. Eaton*, 101 Nev. 705, 710 P.2d 1370 (1985); *Corso v. Merrill, supra; Dunphy v. Gregor*, 261 N.J.Super. 110, 617 A.2d 1248

Scheffler, 242 Kan. 857, 752 P.2d 667 (1988); *Wilhoite v. Cobb*, 761 S.W.2d 625 (Ky. Ct. App. 1988), *citing Deutsch v. Schein*, 597 S.W.2d 141 (Ky. 1980); *Hammond v. Central Lane Communications Center*, 312 Or. 17, 816 P.2d 593 (1991).

(1992); *Zamora v. Creamland Dairies, Inc.*, 106 N.M. 628, 747 P.2d 923 (Ct. App. 1987); *High v. Howard*, 64 Ohio St.3d 82, 592 N.E.2d 818 (1992); *Sinn v. Burd, supra; D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975); *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985); *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993); *Gain v. Caroll Mill Co.*, 114 Wash.2d 254, 787 P.2d 553 (1990); *Heldreth v. Marrs, supra; Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986).

The "bystander test" was first articulated by the California Supreme Court in *Dillon v. Legg*. In *Dillon*, a mother and daughter witnessed an automobile strike and kill the mother's other daughter while she was crossing the street. The trial court granted defendant's motion for judgment on the pleadings as to the mother's claim for emotional distress because she was not within the zone of danger, but denied a similar motion in respect of the surviving daughter because there was evidence she was close enough to the accident to have been within the zone of danger and fear for her own safety. 441 P.2d at 915.

Reversing the trial judge, the state supreme court began its analysis with a recognition that courts' denial of such claims in the past on the grounds of a lack of "duty" was premised on the "twin fears that courts will be flooded with an onslaught of (1) fraudulent and (2) indefinable claims," 441 P.2d at 917, and that, "juries, confronted by irreconcilable expert medical testimony, will be unable to distinguish the deceitful from the bona fide. Rejecting those arguments, *Dillon* stressed that, "the possibility that fraudulent assertions may prompt recovery in isolated cases does not justify a wholesale rejection of the *entire class* of claims in which that potentiality arises." 441 P.2d at 917-18 (emphasis added). Nor, in *Dillon's* view, did the possibility of erroneous jury decisions support

the use of artificial tests as a replacement for case-intensive scrutiny:

> Indubitably juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach some erroneous results. But such fallibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier.

441 P.2d at 918. In place of bright-line tests, *Dillon* adopted an approach focusing on the reasonable foreseeability of emotional injury as a result of a defendant's negligence. 441 P.2d at 919-20. To aid the courts in assessing foreseeability, the *Dillon* Court set forth three factors, which have since been characterized as "proximity," "contemporaneous observance" and "relationship" factors.[11] *Dillon* intended these factors to be employed by the courts as an aid in determining whether a particular accident and resulting harm were reasonably foreseeable, and that the courts, "on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen." 441 P.2d at 921. Stated otherwise, the *Dillon* factors

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[11] The *Dillon* factors are:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

441 P.2d at 920.

were not intended to be "fixed" requirements which had to be satisfied as a perquisite to recovery, but were meant to serve as factors taken into account by the courts in assessing the degree of foreseeability. *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109, 114 (1985), *citing Paugh v. Hanks*, 451 N.E.2d at 764.

Although intended to broaden the right of recovery for emotional injuries, *Dillon's* bystander test has often operated to exclude meritorious claims. The reason is that many courts have hardened the *Dillon* factors into substantive rules of recovery. *See* Comment, *A Jurisdictional Survey* at 813-14; Bell, *The Bell Tolls* at 339-40.[12] Many of these jurisdictions, for example, condition bystander recovery on close familial relationships. *James v. Lieb; Gates v. Richardson*, 719 P.2d at 199; *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983); *Covello v. Weis Markets, Inc.*, 415 Pa. Super. 610, 610 A.2d 50 (1992), *appeal denied*, 622 A.2d 1376 (Pa. 1993). Under these states' formulations, bystander recovery would be mechanically denied to lifelong friends, fiancees, co-workers, and even long-time co-

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[12] This rigid approach has been criticized by a number of courts and commentators. *Paugh v. Hanks; Culbert v. Sampson's Supermarkets; Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038, 1043 (Alaska 1986); Comment, *A Jurisdictional Survey* 813 & n. 173 (listing other commentators criticizing the approach); *Ochoa v. Superior Court*, 39 Cal.3d 159, 216 Cal. Rptr. 661, 703 P.2d 1 (1985) (Bird C.J., concurring and dissenting). As stated by the Supreme Judicial Court of Maine in *Culbert*:

> [I]t should be remembered that since the imposition of liability is ultimately a factual determination which must be made on a case by case basis, the *Dillon* test should not be applied formulistically to bar arguably valid claims.

444 A.2d at 437.

habiting life-mates who do not establish the elements of common law marriage, all of whom could foreseeably suffer genuine emotional injury as a result of witnessing the death or serious injury of another.

In addition to the "physical impact," "zone of danger" and "bystander" tests, the presence of "objective physical manifestations" certifying the genuineness or seriousness of emotional injuries has been accepted as a sufficient basis for a negligent infliction action in a variety of situations in Massachusetts, Idaho, South Dakota, Washington, and Virginia. *Sullivan v. Boston Gas Co.*, 414 Mass. 129, 605 N.E.2d 805 (1993) (gas explosion destroying home); *Czaplicki v. Gooding Joint School District No. 231*, 116 Idaho 326, 775 P.2d 640 (1989) (death of child because school principal failed to call ambulance); *Wright v. Coca Cola Bottling Co. of Central South Dakota, Inc.*, 414 N.W.2d 608 (S.D. 1987) (drinking soft drink from a bottle containing decomposing mouse); *Hunsley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096 (1976) (*en banc*) (home struck by automobile); *Hughes v. Moore*, 214 Va. 27, 197 SE.2d 214 (1973) (same). The consensus in these authorities is that the "objective" evidence must demonstrate emotional distress of greater severity than " 'mere upset, dismay, humiliation, grief and anger,' " *Sullivan*, 605 NE.2d at 809-10, *quoting Corso v. Merrill*, 119 N.H. 647,653, A.2d 300 (1979). As stated in *Wright*:

> [T]he jury should be entrusted with determining whether the injury is so serious or substantial to warrant recovery. If the harm is trivial or temporary, falsified or imagined, the jury's decision will be made accordingly; . . .

414 N.W.2d at 610.[13]

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[13] As to the types of injurys found sufficient to satisfy this standard, see *Sullivan* (post-traumatic stress disorder with

Finally, a few decisions have rejected even the physical manifestations requirement in favor of a more fluid approach based upon foreseeability and the seriousness of the injury. *Johnson v. Ruark Obstetrics and Gynecology Associates,* 327 N.C. 283, 395 S.E.2d 85 (1990), *reh. denied,* 327 N.C. 644, 399 S.E.2d 133 (1990); *Gammon v. Osteopathic Hospital of Maine, Inc.,* 534 A.2d 1282 (Me. 1987); *Bass v. Nooney Co.,* 646 S.W.2d 765 (Mo. 1983) (*en banc*); *Molien v. Kaiser Foundation Hospitals,* 27 Cal.3d 916, 167 Cal.Rptr. 831, 616 P.2d 813 (1980); *Montinieri v. Southern New England Tel. Co.,* 175 Conn. 337, 398 A.2d 1180 (1978).

C. Most Of The Historical Justifications For The "Zone of Danger" And Other Tests Have Been Repudiated

As discussed above, the reasons most often cited in the past as supporting the need for restrictions in this area are: (i) the potential for fraudulent claims; (ii) the fear of a "flood" of lawsuits; (iii) the view that medical science was ill-equipped to determine causation; and (iv) the concern over inflicting unlimited liability upon tortfeasors. The courts are now in virtual agreement that the first three concerns are baseless. *Sinn v. Burd* (containing a comprehensive refutation of all of the concerns); *Neiderman v. Brodsky,* 436 Pa. 401, 261 A.2d 84 (1970)

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attendant symptoms of sleeplessness, weeping, depression, despair, diarrhea and heart palpitation); *Czaplicki* (suicidal thoughts, sleep disorders, reduced libido, fatigue, stomach pains and loss of appetite); *Wright* (diarrhea, bitter taste and regurgitating); *Hughes* (anxiety reaction with phobia and hysteria); Restatement (Second) of Torts, Section 436A comment c (1965) (continued mental disturbance or continued symptoms as opposed to "transitory, non-recurring physical phenomena, harmless in themselves").

(same); *Culbert v. Sampson's Supermarkets,* (same). *See also Hunsley v. Giard* ("In the main, the reasons advanced by the courts for denying recovery, i.e., lack of precedent, increased litigation, remoteness, and fear of fictitious and feigned claims, have now been generally discarded"); *Gates v. Richardson,* 719 P.2d at 197 ("doing away with an entire class of negligence action solely because some of the actions may be tainted by mischief is like 'employing a cannon to kill a flea' "); *Dillon v. Legg,* 441 P.2d at 917, n.3 (1968) ("we point out that courts are responsible for dealing with cases on their merits, whether there be few suits or many;" rejecting the "flood" argument); *Bass v. Nooney,* 646 S.W.2d at 770 (no flood has resulted); *Orlo v. Connecticut Co.,* 21 A.2d at 404 (the difficulty tracing causation has been minimized by advances in medical knowledge). As summarized almost thirty years ago by the Supreme Court of Delaware:

> Neither volume of cases, nor danger of fraudulent claims, nor difficulty of proof, will relieve the courts of their obligation in this regard. None of these problems are insuperable. Statistics fail to show that there has been a "flood" of such cases in those jurisdictions in which recovery is allowed; but if there be increased litigation, the courts must willingly cope with the task. As to the danger of illusory and fictional claims, this is not a new problem; our courts deal constantly with claims for pain and suffering based upon subjective symptoms only; and the courts and the medical profession have been found equal to the danger. Fraudulent claims may be feigned in a slight-impact case as well as in a no-impact case. Likewise, the problems of adequacy of proof, for the avoidance of speculative and conjectural damages, are common to personal injury cases generally and are surmountable, being satisfactorily solved by our courts in case after case.

Robb v. Pennsylvania Railroad Company, 210 A.2d at 714 (Del. 1965).

All the other policy reasons having been repudiated, it now appears that the only remaining concern arguably supporting the common law restrictions is a reluctance to impose unlimited liability on tortfeasors. The courts relying on this argument apparently worry that, without limits on liability, emotional injury cases will turn into virtual family reunions:

> The problem of unlimited liability is suggested by the unforeseeable consequence of extending recovery for harm to others than those directly involved in the accident. If foreseeability be the sole test, then once liability is extended the logic of the principle would not and could not remain confined. It would extend to older children, fathers, grandparents, relatives, or others in *loco parentis,* and even to sensitive caretakers, or even any other affected bystanders.

Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 423 (1969). As stated more recently by the District of Columbia Court of Appeals:

> "It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident and *every distant relative* of the person injured, as well as *all his friends."*

Williams. v. Baker, 572 A.2d at 1069 (emphasis added), *quoting* Prosser and Keeton, *The Law of Torts,* Section 54 at 366 (5th Ed. 1984). *See also Kelly v. Kokua Sales & Supply, Ltd.,* 56 Haw. 204, 532 P.2d 673, 676 (1975) ("without a reasonable and proper limitation of the scope of the duty of care . . . [tortfeasors] would be confronted with an

unimaginable, unbearable and totally unpredictable liability"); *Gates v. Richardson,,* 719 P.2d at 198 ("Some limitation on the class of plaintiffs is also justified by the potential burden on economic activity that an unlimited class could impose") (limiting bystander recovery to persons permitted to bring wrongful death actions); *Strickland v. Hodges,* 134 Ga. App. 909, 216 S.E.2d 706, 708 (1975) ("Pragmatic reasoning . . . has been the basis on which most jurisdictions have refused to impose liability . . . "); Comment, *A Jurisdictional Survey* at 790 ("the concern for exposing defendants to potentially unlimited liability . . . has been the most lasting policy limitation on actions for mental distress").

Underlying the concern over unlimited liability is the premise that it is "unfair" to tortfeasors to extend liability for their negligence beyond a certain point. As stated in *Halko v. New Jersey Transit,* the concern is over " 'the perceived unfairness of imposing heavy and disproportionate financial burdens on a defendant, whose conduct was only negligent for consequences which appear remote from the "wrongful act." ' " 677 F. Supp. at 139, *quoting* Prosser & Keeton, *The Law of Torts,* Section 54 (5th Ed. 1984) at 360-1.

As will be discussed below in detail, however justified the concerns over potentially ruinous liability are at common law, they are not justified in the context of FELA. The Act's own express limitations on the class of persons entitled to recover from the railroads effectively prevents carrier liability to remote and unforeseeable plaintiffs. Additionally, the FELA claimant's burden of proving traditional negligence elements, the practical difficulties discouraging the institution of formal litigation over petty emotional complaints and the alternative venue provided by the arbitration procedures established under the Railway Labor Act will work together to dead-end the "parade of horribles" being marched before this Court by petitioner and its *amici*.

III THE COURT OF APPEALS PROPERLY BASED ITS DECISION ON AN EXACTING SCRUTINY OF THE FACTS GUIDED BY COMMON LAW DEVELOPMENTS AS GAUGED BY THE FELA

A. The Court of Appeals' Approach Properly Recognized The Tension Between The FELA And The Restrictive State Law Tests

As is clear from the above, there is a fundamental and profound tension between the remedial goal of the FELA to provide recovery to injured rail workers and the restrictive function of the "zone of danger" and other common law emotional injury tests. Recognizing this tension, the court of appeals in *Gottshall* declined to graft any particular state law test onto the FELA or otherwise to promulgate a "bright line" rule, relying instead on an exacting scrutiny of the facts to determine whether a plaintiff's claim (i) had a "solid basis" in common law and (ii) satisfied traditional tort elements. It is respondent's position that the court of appeals' approach wisely balanced the relevant conflicting interests and should be upheld by this Court. Petitioner's arguments that the court of appeals' approach allows recovery based upon the "bare showing" of an injury in violation of the FELA and would result in imposing "unlimited liability" on carriers are without merit.

The foundation of the court of appeals' approach is its recognition of the "fundamental tension" existing between the restrictive common law emotional injury tests and "policy underlying the FELA itself," which "was enacted in broad, open-ended terms so that recovery will be liberally granted and that an employer's standard of conduct will be malleable, and adapt to the changing realities of industrial conditions and standards" (A-23 to A-24). As the court of appeals saw it, the challenge facing the courts in deciding the legal sufficiency of FELA emotional injury claims is to "reconcile the two policies, discerning the trends and developments in common law and then gauging them according to the policy underlying the FELA, for FELA is at issue here and creates the cause of action" (A-24).

Reviewing the history and remedial purpose of the FELA, including the Act's liberal construction and departures from common law (A-25 through A-30), the court of appeals reached the "inexorable conclusion" that, "[s]tate law tests are not the *sine qua non* for determining whether plaintiff has a cognizable FELA claim and doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims" (A-30). Accordingly, and because the mechanistic common law tests provide only a "dubious method" of separating meritorious from unmeritorious claims (A-31 through A-34), the court of appeals scrutinized the facts of the *Gottshall* case in detail, measuring them against *all* of the common law tests as a means of providing "a threshold assurance that there is a likelihood of genuine and serious emotional injury" (A-35), and the respondent had a "solid basis in the present state of common law to permit him to recover" (A-36).

B. The Court of Appeals Properly Found A Solid Basis In Common Law For Respondent's Claim

The court of appeals began its determination whether petitioner's claim had a solid basis in common law by weighing it against the "bystander" test (A-36 to A-40). The court of appeals concluded that, with the exception of the family relationship element, the scenario represented a "classic common law claim." In the court of appeals' view, however, the fact that respondent and Mr. Johns were not blood relatives was not fatal to respondent's claims, because: (i) such a requirement would be inconsistent with the realities of the railway industry, where there "will hardly be a situation where one sees another family member injured while working"; (ii) FELA courts, unlike common law courts, are not concerned with "society as a whole" and need not fear extending bystander liability into the " 'fantastic realm of infinite liability,' " thereby burdening society as a whole; (iii) FELA courts are not concerned with the social policy ramifications of extending liability to unmarried or unrelated persons; and (iv) because a person might very well be traumatized by witnessing the death or severe injury of a close friend, the family relationship requirement is an arbitrary line inconsistent with the remedial and humanitarian goals of the FELA.[14]

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[14] A number of courts do not require a blood relationship between the victim and the witness-bystander as a prerequisite to recovery. *Leong v. Takasaki*, 520 P.2d 758 (Hawaii 1974); *Paugh v. Hanks; Dunphy v. Gregor*, 261 N.J. Super. 110, 617 A.2d 1248 (1992). Arguing against a blood or marital relationship requirement, one commentator has stated that,

> "The test (for recovery) should not be blood or marriage, but rather whether the judge or jury is convinced from all the facts that there existed such a rapport between the victim and the one suffering shock as to make the causal connection between the defendant's conduct and the shock understandable."

12 F. Stone, *Louisiana Law Civil Treatise Tort Doctrine*, Section 170 (1977), *quoted in Lejeune v. Rayne Branch Hospital*, 566 So.2d at 570.

Although the court of appeals measured respondent's claim against the "bystander" test, it correctly pointed out that respondent was not a mere bystander but was an "active participant" in the events surrounding Mr. Johns' death, akin to the plaintiff in *Althoff v. Consolidated Rail Corporation*, No. 87-4384, *slip op.* (E.D. Pa. June 13, 1988) (plaintiff operated a crane which released an object that killed a co-worker) (A-40 to A-41). As summarized by the court of appeals:

> Here Gottshall was more than a mere witness at the scene. While not a cause, he was an active participant in the events leading to Johns' death. He was among the first to rush to Johns' assistance. He gave mouth-to-mouth resuscitation and CPR to Johns for a full forty minutes. He carried the body of his friend to the ambulance parked two thousand feet away. The sense of loss and helplessness as one's friend dies beneath one's breath and the resulting emotional injury that he would suffer is easily foreseeable.

(A-40 to A-41).

In addition to measuring respondent's claim against the "bystander" and "active participant" tests, the court of appeals found that respondent's claim was not one for purely emotional injuries but involved numerous sequalae sufficient to satisfy the common law "physical

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In the instant case, the relationship between respondent and Mr. Johns would clearly meet that test. Respondent had known Mr. Johns for fifteen years (GA-00004 to 00007). On weekends, they socialized at respondent's house, where they talked about railroad history (*id.*). As known by supervisor Norvick, respondent and Mr. Johns had worked closely on railroad production gangs, taking their meals and sleeping together on the same railroad cars (GA-00031).

manifestation" test, including respondent's loss of forty pounds, his diagnosis by three doctors of major depression and post-traumatic stress disorder, with anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares and fear of leaving home (A-42 to A-44).

Not discussed by the court of appeals, but amply demonstrated on the record, is that respondent's claim also satisfies the "zone of danger" test.[15] Initially, on the date of Mr. Johns' death, respondent was exposed to the same extreme working conditions that killed Mr. Johns. After Mr. Johns' death, and while Mr. Johns' corpse was lying on the ground, respondent was ordered back to work. The following day, respondent was again ordered to work under the same conditions. Certainly, performing hard physical labor in extreme heat and humidity at an accelerated pace and without work breaks involves a physical danger, and it is difficult to understand petitioner's unsupported assertion to the contrary. *See* Petitioner's Brief at 43.[16]

After reviewing the facts against various common law emotional injury tests, the court of appeals measured the circumstances in detail against the traditional negligence requirements of breach of duty, injury and causation (A-44 to A-56). Turning first to respondent's duty of care, the court of appeals emphasized that the situation facing respondent did not involve ordinary job stress or weather conditions "falling within the broad spectrum of conditions that constitutes ordinary working conditions" (A-46). Noting that, "[a]dverse weather conditions may constitute dangerous working conditions and impose upon the employer a duty to exercise a degree of care commensurate with the risks," (*id.*), the court of appeals summarized the extreme conditions facing petitioner on the date of Mr. Johns' death (A-47 to A-50). The court of appeals also reviewed the situation respondent was exposed to after Mr. Johns' death, including petitioner's ordering respondent back to work under the same conditions that had killed Mr. Johns, forcing respondent to watch Mr. Johns' body lying on the ballast for a full three hours, and requiring respondent to return to work during the following days under the same weather and working conditions (A-52 to A-53).

Under the totality of the circumstances, the court of appeals refused to conclude that petitioner was not negligent as a matter of law, stating that, "the facts, as presented to us and in light most favorable to Gottshall, present a genuine issue of material fact whether Conrail breached a general duty of acting with care and a duty to provide a safe workplace" (A-54).[17]

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[15] Petitioner characterizes the factual basis of respondent's claim as "laboring alongside a colleague who suffers a heart attack while working under time pressure on an unusually hot day." In so downplaying the circumstances, petitioner demonstrates what should be clear from the factual record, namely, that whether respondent was within a "zone of danger" is a factual issue to be decided by a jury.

[16] Indeed, it would be well within reason for a jury to conclude that the above circumstances involved a "physical impact" upon petitioner, satisfying the most restrictive of the common law tests.

[17] The court of appeals also found genuine issues to exist as to whether respondent sustained cognizable injuries and whether those injuries were causally related to petitioner's negligence (A-55 to A-56).

Concluding, the court of appeals emphasized that it did not view railroads as insurers of their workers' safety (A-56), or that liability should be found for "every possible distressful happening to which a railroad worker is exposed" (A-57). The court of appeals also made clear that it was not holding that every bystander to an accident has a valid FELA claim (A-63). Rather,

> [w]e simply hold that considering the totality of these extreme facts in the light most favorable to Gottshall – that is, seeing and actively participating in the events surrounding the death of a friend of fifteen years as a result of Conrail's actions, which includes working men under extreme conditions without taking the precautions arguably required, being forced to stay at the worksite by Conrail for several hours, being forced to be subjected to the same physical force after the accident without the benefits of the precautions arguably required, checking into a mental hospital for three weeks, losing forty pounds, exhibiting other physical manifestations of severe emotional injury, being diagnosed by three doctors as suffering from severe post-traumatic stress syndrome – Gottshall's claim has sufficient indicia of genuineness and he presents genuine issues of whether there is a breach of a duty, injury and causation. He is entitled under FELA to a trial on the merits.

(A-64).

C. Petitioner's Arguments Against the Court of Appeals' Approach Are Unpersuasive

Against the approach adopted by the court of appeals, petitioner advances two primary arguments: that (i) the FELA does not permit recovery based upon a "bare showing that an injury is genuine and foreseeable" and (ii) that the court of appeals' approach would impose

unlimited liability on the railroads.[18] Petitioner's arguments are without substance.

In support of its first point, petitioner argues that the court of appeals' decision is inconsistent with the FELA's common law roots, stating that the Act "always was and continues to be based on the common law principle of negligence, 'the breach of some duty found to rest upon the employer,' [citation omitted] and not solely on the fact that 'genuine' injuries have occurred." Petitioner's Brief at 13.[19] Petitioner is being coy. Nowhere does the court of appeals state or even imply that a cause of action for emotional distress under the FELA can be made out solely by establishing the genuineness of a plaintiff's injuries. To the contrary, after analyzing respondent's claim against the common law emotional injury tests to determine whether it had a "threshold guarantee" of genuineness, the court of appeals expressly and in detail measured the claim against the traditional common law elements of duty, injury and causation (A-44 through A-56). Indeed, the court of appeals was careful to state explicitly that, "We are not holding that every employee who suffers emotional injuries as a result of the railway employer's conduct has a valid FELA claim" (A-63).

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[18] Petitioner's purported fear that the court of appeals' approach will subject it to unlimited liability, the cornerstone of its call to graft the "zone of danger" test onto the FELA, will be discussed in the next section.

[19] Petitioner also supports its argument that the court of appeals' decision is at odds with FELA's common law roots by citation to a number of this Court's earlier decisions. Petitioner's Brief at 14-15. In none of the cases relied upon by petitioner, however, was this Court called upon to decide whether certain types of injuries fell within the Act's coverage. Rather, the decisions cited by petitioner involve this Court's refusal (i) to read new types of *damages* into the FELA, *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988) (Pennsylvania prejudgment interest and "total offset" rules held not applicable in FELA); *Michigan Central Railroad Company v. Vreeland*, 227 U.S. 59 (1913) (refusing to provide survivors with loss of consortium damages); *Gulf, Colorado and Sante Fe Ry. Co. v. McGinnis*, 228 U.S. 173 (1913) (same); *American Railroad of Porto Rico v. Didricksen*, 227 U.S. 145 (1913) (same); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) (same; Jones Act); or (ii) to extend the Act's coverage to persons other than a carrier's employees or servants. *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974) (FELA did not cover person who was not carrier's servant); *Ward v. Atlantic Coast Line Railroad Co.*, 362 U.S. 396 (1960) (under facts of the case, company that repaired tracks for railroad was not railroad's agent).

The second argument offered by petitioner for its position that the court of appeals' decision is inconsistent with the FELA is that Congress intended the Act to cover only physical injuries peculiar to the railroad industry. Petitioner's Brief at 16-18. Petitioner relies on some colorful remarks about "life and limb" by Presidents Harrison and Roosevelt, together with certain portions of the FELA's legislative history. According to petitioner, this history, "reinforces the words of the statute," which, petitioner concludes, was meant to cover only physical and not emotional injuries.[20] Identical arguments were rejected by this Court long ago:

> We recognize of course that, when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate railroads. Obviously these were the major causes of injury and death resulting from railroad operations. But accidental injuries were not the only ones likely to occur. And *nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage any injury* resulting "in whole or in part from the negligence" of the carrier. *If such an intent can be found, it must be read into the Act by sheer inference.*

Urie v. Thompson, 337 U.S. at 163 (emphasis added).

In addition to being incorrect in its reading of the Act's history and language, petitioner ignores the broad construction given the Act by this Court. For example, in arguing that Congress intended the Act to cover only "unusual" injuries, or injuries peculiar to the railroad, petitioner seems not to recognize that courts construing the FELA have applied the Act to a multitude of "non-railroad" type accidents and injuries. *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963) (bug bite); *Lillie v. Thompson*, 332 U.S. 459 (1947) (assault); *Harrison v. Missouri Pacific Railroad Co.*, 372 U.S. 248 (1963) (same); *Urie v. Thompson* (silicosis); *Gallose v. Long Island Railroad Co.*, 878 F.2d 80 (2d Cir. 1989) (dog bite); *Cazad v. Chesapeake and Ohio Ry. Co.*, 622 F.2d 72 (4th Cir. 1980) (fall into drain culvert on third-party premises); *Schweitzer v. Conrail*, 758 F.2d 936 (3d Cir. 1985) (asbestos-related injuries), *cert. denied*, 474 U.S. 864 (1985); *Moore v. Chesapeake & Ohio Ry. Co.*, 649 F.2d 1004 (4th Cir. 1981) (slipping on butter in cafeteria); *Atchison, Topeka & Santa Fe Ry. Co. v. Preston*, 257 F.2d 933 (10th Cir. 1958) (lipoid pneumonia and fibrosis of lungs); *Masiello v. Metro-North Commuter Railroad*, 748 F. Supp. 199 (S.D.N.Y. 1990) (sexual harassment); *Eng v. Southern Pacific Co.*, 210 F. 92 (D. Or. 1913) (constructing office); *Coal & Coke Ry. Co. v. Deal*, 231 F. 604 (4th Cir. 1916) (erecting telegraph pole), *error dismissed*, 245 U.S. 681 (1917); *Zimmermann v. Scandrett*, 57 F. Supp. 799 (D. Wis. 1944) (repairing door).

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[20] Respondent does not understand what petitioner means when it says that the Act's history "reinforces the words of the statute." The Act's wording does not limit the types of injuries covered in any way. To the contrary, as this Court has recognized, "[o]n its face," the FELA covers "every injury." *Urie v. Thompson*, 337 U.S. at 181.

In summary, there is nothing in the court of appeals' decision contradictory to the FELA. To the contrary, as discussed above, the court of appeals' decision itself is deeply rooted in the history, language and construction of the Act.

IV. THE "ZONE OF DANGER" TEST IS UNNECESSARILY RESTRICTIVE IN THE CONTEXT OF THE FELA

A. There Is No Potential For Unlimited Liability In The Context Of The FELA

Petitioner urges this Court to ignore the past twenty-five years of common law experience with emotional injury claims and to read into the FELA the regressive and indisputably arbitrary "zone of danger" test. Petitioner's Brief at 33-43. The cornerstone of petitioner's position is that the zone of danger test will prevent the "unlimited liability" "out of all proportion to a defendant's fault" which it contends would result from "bystander" and other foreseeability tests.[21] Echoing the

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[21] Petitioner offers two other arguments, *to wit:* (i) the zone of danger test balances the interests of employees, carriers and society; and (ii) the zone of danger test is more consistent with congressional concern over physical injury and death than the approach adopted by the court of appeals. Petitioner's Brief at 34-5. On its first point, Petioner asserts that FELA "represents a careful balance between modified common law doctrines [the fellow servant rule, contributory negligence, assumption of risk and contractual waiver of liability] and new statutory remedies" and urges caution lest this "balance" be "upset." Petitioner's Brief at 34-5 and n. 14. Petitioner fails, however, to explain how emotional injury claims fit into this "balance" or how recognizing such claims might "upset" the balance. Petitioner's first point is fluff.

Petitioner's second point can be dispensed with summarily as well. As discussed above, this Court has flatly rejected assertions that the FELA is concerned wholly or primarily with

boilerplate hyperbole employed by some of the common law courts, petitioner condemns the court of appeals for having, "abdicated its judicial responsibility to determine the appropriate boundaries for negligent infliction of emotional distress claims under the FELA," and laments the " 'random and wayward' consequences" of bystander liability, which would "multiply 'damages incalculably.' " Petitioner's Brief at 24, quoting *Gaston v. Flowers Transportation,* 866 F.2d 816, 820 (5th Cir. 1989).

The position taken by petitioner and its *amici* that grafting the zone of danger test onto the FELA is necessary to save the railroads from ruinous liability demonstrate a fundamental failure to grasp the Act's own express limitations on the class of potential FELA claimants. Petitioner's assertions also sidestep an FELA plaintiff's burden of proving traditional negligence elements of duty, breach of duty, causation and injury, as well as the practical difficulties discouraging the institution of formal litigation over minor emotional complaints. Finally, petitioner overlooks the importance of the arbitration venue established under Railway Labor Act.

In short, in urging the zone of danger test, petitioner and its *amici* are asking this Court to solve a problem that does not exist.

Whatever the potential of bystander and other "foreseeability" tests to extend tortfeasor liability to remote and unforeseeable plaintiffs in the context of state common law, there is no such possibility in the context of the

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any particular type or class of injury. To "read into [the Act's] all-inclusive wording a restriction as to . . . the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court." *Urie v. Thompson,* 337 U.S. at 181-2.

FELA. Fundamentally, the FELA significantly circumscribes the class of potential employee claimants by limiting a carrier's liability to injuries sustained by an employee *"while he is employed by such carrier . . . "* 45 U.S.C. Section 51; *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 319 (1974). Thus, it is axiomatic that in order to recover under the FELA, "a plaintiff must establish the requisite employment relationship with the defendant railroad." *De Shong v. Seaboard Coast Line R. Co.*, 737 F.2d 1520 , 1521 (11th Cir. 1984). The Act provides no cause of action for spouses, children, siblings, parents, aunts, uncles or "sensitive caretakers." *See New York Central & Hudson Railroad Co. v. Tonsellito*, 244 U.S. 360, 361-2 (1917) (father of injured employee – a minor – has no cause of action for loss of son's services); *Dixon v. CSX Transp., Inc.*, 990 F.2d 1440 (4th Cir. 1993) (spouse has no loss of consortium claim under FELA), *cert. denied*, 114 S.Ct. 305 (1993); *Kelsaw v. Union Pacific Railroad Co.*, 686 F.2d 819, 820 (6th Cir. 1982) (same), *cert. denied*, 459 U.S. 1207 (1983); *Jess v. Great Northern Ry. Co.*, 401 F.2d 535, 536 (9th Cir. 1968) (same) (The FELA "not only provides the exclusive remedy for the recovery by an employee . . . , but also governs the recovery by others. . . . ").

A negligent railroad simply will not be confronted with a line of long lost uncles claiming their lives were ruined when they read in the paper about the death of nephew what's-his-name. Carriers facing emotional injury claims will answer only to their own employees.

Predictably, petitioner raises the prospect that in bystander cases, carriers theoretically could face emotional injury claims from any employee who happens to hear about an underlying accident:

> [T]he court in *Gottshall* concluded that it was foreseeable that Gottshall would experience an emotional injury because he saw his friend die

> and because he labored under the same working conditions as his friend.[22] Under the court's reasoning, it surely is no less foreseeable that other men on Gottshall's crew – or even men on other Conrail crews hearing of Johns' death – also would suffer emotional injuries because of the hard labor that their jobs required them to perform on a hot day.

Petitioner's Brief at 24.[23]

Contrary to petitioner's concerns, a carrier whose negligence results in physical injuries to one of its employees will not automatically be subjected to liability to every other employee, even those claiming to be friends with or related to the physically injured employee. Instead, an employee asserting emotional injury claims as a result of the death or injury of a third person will have to establish a *causal nexus* between his emotional injury and his *own job*. In the context of physical injuries, it is well-established under the FELA that an employee must prove that he sustained his injuries while acting within the scope of his own employment. *Rogers v. Chicago & North Western Transp. Co.*, 947 F.2d 837 (7th Cir. 1991) (off-duty employee jogging on railroad property held to have no cause of action under the Act); *Fowler v. Seaboard Coastline Railroad*, 638 F.2d 17 (5th Cir. 1981) (employee riding motorcycle on railroad property during lunch hour held to have no cause of action); *Wilson v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 841 F.2d 1347 (7th Cir. 1988) (issues of fact preclude summary judgment against claim of employee injured while driving his own vehicle), *cert. dismissed*, 487 U.S. 1244 (1988); *Atchison, Topeka & Santa Fe Ry. Co. v. Wottle*, 193 F.2d 628 (10th Cir.) (off-duty employee hit by train on way to pick up groceries held to have no cause of action), *cert. dismissed*, 344 U.S. 850 (1952).

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[22] As to the other men at the worksite when Mr. Johns' died, petitioner overlooks some important points. Respondent's particularly close relationship with Mr. Johns, apparently was not shared by their other co-workers. Respondent's unique and active involvment with Mr. Johns' death as the person who administered CPR to Mr. Johns' corpse for forty-five minutes, and respondent's being reprimanded by his superiors for having attempted to save Mr. Johns' life also add significantly to the mix of circumstances resulting in respondent's emotional collapse.

[23] Petitioner also cites *Gaston* for the argument that imposing bystander liability on the railroads would expand liability on the basis of factors "entirely incidental" to the carriers' operations, such as "how many crew members happen to be standing around to observe the incident, . . . " Petitioner's Brief at 37, *quoting Gaston*, 866 F.2d at 820. The *Gaston* court is factually incorrect in asserting that the presence, number and location of "bystander" employees is irrelevant to the operation of a railroad. Presumably, carriers staff their work crews in accordance with the needs of their jobs. If a certain number of men are present at a particular worksite, it is because the railroad places them there. And if, through the railroad's negligence, that job site is a dangerous one, it hardly seems unjust that the railroad compensate each man present for any serious injuries he genuinely sustains as a result of that negligence, whether the injuries be physical, emotional or, as in petitioner's case, a combination of both.

An employee's act will be found to be within the scope of his employment when it is either performed in the course of his work for the railroad or as a "necessary incident" to that work. *Erie Railroad Co. v. Winfield*, 244 U.S. 170, 173 (1917), *cited in Wilson v. Chicago*, 841 F.2d at 1355 and *Atchison, Topeka & Santa Fe v. Wottle*, 193 F.2d at 630. Distinguished from such covered acts are those " 'undertaken by an employee for a private purpose and having no *causal relationship* with his employment.' " *Wilson*, 841 F.2d at 1355 (emphasis added), *quoting Atchison*, 193 F.2d at 630. *See also Fowler v. Seaboard Coastline Railroad Co.*, 638 F.2d at 18-19 ("We hold that coverage does not extend to activities undertaken by an employee for a private purpose and having *no causal relationship* to his employment . . . ") (emphasis added).

Just as an FELA plaintiff asserting physical injuries must establish a causal nexus between his own job and the activities giving rise to his injuries, so must a plaintiff claiming emotional injury under the Act. In the instant case, for example, had respondent taken the day off work, or been engaged at some other worksite, and learned of Mr. Johns' death secondhand, he would not be able to recover. The same would hold true for any other of Mr. Johns' friends and relatives who happened to have been respondent's employees but who were not present with Mr. Johns at the worksite when he died. Whatever their emotional injuries as a result of learning of Mr. Johns' death, they could not recover against petitioner because those injuries did not result *as a result of their own employment*.

In addition to the FELA's own limitations on the class of potential injury claimants, a number of practical and legal factors mitigate strongly against the possibility that this Court's adoption of a foreseeability-based approach would subject the railroads to unlimited and ruinous liability. Initially, as petitioner correctly points out, "there exists a diversity of psychological make-ups among railroad employees, just as among the general population, and different people inevitably will react to the same events in different ways." Petitioner's Brief at 24. When faced with the death of a co-worker, few railroad employees will suffer the type of serious emotional injuries necessary to expose carriers to large liability awards. The *Gottshall* case itself illustrates this. Present with Mr.

Johns and respondent were a number of other employees. Although everyone suffered emotional distress to some extent, only one, respondent, was injured seriously. Indeed, none of the other workers even brought a claim.

Had one or more of respondent's co-workers brought an FELA claim for their minor emotional distress, of course, they would have had to convince a jury not only that their injuries were foreseeable but that those injuries were both real and causally related to a breach of duty by petitioner. Even then, it is likely that any award they received for their minor distress would be minimal, and would not significantly increase the cumulative damages paid by petitioner in connection with the incident. In short, it is difficult to see how extending petitioner's liability from Mr. Johns to his co-workers would visit upon petitioner the "exponential damages" it purports to fear.

Finally, the tired predictions of an avalanche of cases offered by petitioner and its *amici* overlook the alternative venue provided by the Railway Labor Act. As petitioner itself recognizes, the RLA has established procedures for dealing with both major and minor disputes, the latter including those that grow out of, *inter alia*, working conditions. Petitioner's Brief at 27 and n.9. Railroad employees upset with general working conditions, disagreements with superiors and other such routine matters have a ready forum within which to air their grievances. They do not have to retain attorneys and incur the substantial expenses associated with formal litigation.[24]

In addition to its argument that, absent a zone of danger requirement, carriers will suffer vast increases in liability, petitioner contends that affording a cause of action for emotional injuries to bystanders and others not threatened with physical harm would be "unfair" because carriers cannot anticipate such injuries and take precautions to avoid them. Petitioner's Brief at 42. Petitioner's argument is without merit. There is no unfairness in making the railroads liable for the emotional injuries suffered by their own employees because it is the railroads themselves which place the employees in the situations resulting in the employees' injuries. The instant case is a good example. It was petitioner who assigned respondent to work with respondent's friend, Mr. Johns, in conditions that foreseeably could result in serious physical injury to a man in Mr. Johns' condition. It was petitioner who forced respondent to toil under those same conditions. It was petitioner who had canceled CPR training for respondent's co-workers, leaving respondent as the only person at the worksite who could, and therefore had to, blow breath into his friend's corpse for forty-five minutes, while his supervisor drove around the county searching for a telephone because petitioner had taken its emergency communications system off line without telling anyone. Finally, it was petitioner who forced respondent to continue working for three hours after Mr. Johns' death while Mr. Johns' body "bake[d] like a potato" in plain view. Respondent is not some "remote" claimant whose existence and relationship to Mr. Johns were unknown to petitioner and whose emotional distress over Mr. Johns' death therefore could not have been foreseen and prevented.[25]

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[24] A practical matter sidestepped by petitioner and its *amici* is that it would not be easy for employees merely "upset," "annoyed" or even "disgusted" by general working conditions or someone's bad manners to convince attorneys to undertake the expense and risk of prosecuting such claims in the federal or state court systems. Cries that the courts will be swamped by FELA claimants asserting "bruised feelings" or "emotional upset" are simply unrealistic.

On a more fundamental level, there can be no argument that, as a matter of public policy, it would be "unfair" to impose liability upon the railroads for emotional injuries suffered by their employees as a result of the railroads' negligent acts. The public policy determinations concerning carriers' obligations were made in 1908, by Congress. As the court of appeals pointed out, "[i]n FELA, Congress, rather than the courts, created a cause of action and allocated the economic and social burdens" (A-39). For the past eighty-five years, carriers have been held liable for the physical injuries they negligently inflict on their own employees. There is no principled basis for shielding the railroads from responsibility for the emotional injuries suffered by their employees as a result of that same negligence.

B. The Zone of Danger Test Inappropriately Strips FELA Plaintiffs Of Their Right To Jury Trial In Whole Classes Of Claims

As discussed above, the FELA is an avowed departure from common law principles restricting recovery.

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[25] Nor should this Court entertain petitioner's argument that, "it is impossible for the defendant to estimate possible [emotional] injuries and make any assessment of damages." Petitioner's Brief at 42. The premise of this argument is that carriers' management personnel sit around and decide whether or not to engage in negligent conduct based upon how many workers they expect to be injured otherwise and that, whereas the carriers can predict the number of workers who would be physically injured by their negligence, they cannot estimate how many workers would be emotionally injured. Such a premise is facially absurd.

Sinkler v. Missouri Pacific Railroad. The Act was fashioned in broad language, which this Court has read even more broadly. *Buell*, 480 U.S. at 561-62. Indeed, in construing the FELA, this Court has not only refused to read common law restrictions into the Act's language, *Urie, Kernan v. American Dredging Co.*, but has shown its willingness to depart from common law principles where necessary to facilitate the policies of the Act. *Urie, Kernan, Rogers.*

Reading the zone of danger test into the Act, thereby extinguishing entire *classes* of emotional injury claims *as a matter of law* would run directly contrary to the above well-established principles. It would also be particularly offensive to the expanded role Congress afforded FELA juries through the 1939 amendments to the Act. Indeed, present efforts to impose common law restrictions on recovery for emotional injury parallel earlier efforts by some courts to use common law concepts to defeat recovery, in response to which the 1939 amendments were enacted. As explained by this Court in *Rogers v. Missouri Pacific R. Co.:*

> Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury determination. That was because the courts developed concepts of assumption of risk and of the coverage of the law, which defeated employee claims *as a matter of law.* Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases – whether employer fault played any part in the employee's mishap.
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> * * *
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> . . . The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these cases exclusively in

> the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury.

352 U.S. 509, 511 (emphasis added).

What petitioner seeks here is for this Court to erect barriers the function of which would be to defeat emotional injury claims *as a matter of law,* thereby removing such cases from the purview of the jury, as the lower courts did through the employment of assumption of risk and other common law limitations before the 1939 amendments to the Act. What those amendments and this Court's decisions teach, however, is that a jury decision is an integral part of the remedy provided by the FELA. *See Dice v. Akron, Canton & Youngstown Railroad Co.,* 342 U.S. 359, 363 (1952) (jury determination of factual questions is " 'part and parcel of the remedy afforded railroad workers' " by the FELA), *quoting Bailey v. Central Vermont Ry., Inc.,* 319 U.S. 350, 354 (1943). *See also Halko v. New Jersey Transit Rail Operations, Inc.,* 677 F. Supp. 135, 143 (S.D.N.Y. 1987), *citing Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 360, *reh'g denied,* 369 U.S. 882 (1962).[26]

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[26] Just as it would be offensive to the remedial purposes of the FELA and the expanded role that juries are to play in FELA cases for the courts to impose bright line rules excluding classes of claims as a matter of law, it would also be inconsistent with the Act's intent to allow such rules to dictate the terms under which the juries themselves could award recovery. As discussed above, the state law "physical impact," "zone of danger" and "bystander" tests have all been criticized as arbitrarily underinclusive of meritorious claims. Requiring FELA juries to apply those tests, or any of them, as substantive rules of recovery, rather than merely as guidelines in ascertaining the geniuneness and severity of claims would usurp the expanded powers of FELA juries.

V. THIS COURT SHOULD GO BEYOND THE COURT OF APPEALS' DECISION AND ADOPT AN APPROACH BASED ON TRADITIONAL NEGLIGENCE ELEMENTS.

As is clear from the above, most of the original justifications for the common law restrictions to recovery for emotional injury have been repudiated and the only remaining policy basis, the potential for subjecting tortfeasors to unlimited liability, does not exist in the context of the Federal Employers' Liability Act. As a result, there are no longer any interests against which to "balance" the remedial policy of the FELA, and no need to employ any or all of the restrictive common law paradigms. Accordingly, respondent urges this Court to move beyond the balancing approach employed by the court of appeals and hold that FELA emotional injury claims are to be evaluated by courts and juries under the same criteria as are FELA physical injury claims, to wit, duty, breach of duty, causation and injury. It is high time that some small area of the law unburden emotional injury claims from their presumption of illegitimacy and accord them evidentiary equality with claims for physical injuries.

CONCLUSION

For the foregoing reasons, respondent James E. Gottshall respectfully requests this Court to affirm the judgment of the Court of Appeals for the Third Circuit in *Gottshall v. Consolidated Rail Corporation* and remand with instructions for the court of appeals to remand to the district court with instructions to set the case for trial.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1992

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CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents.

◆

On Writ Of Certiorari
To The United States Court Of Appeals
To The Third Circuit

◆

BRIEF FOR RESPONDENT ALAN CARLISLE

◆

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QUESTION PRESENTED

1. Did the Court of Appeals err when it applied traditional negligence elements of duty, foreseeability, breach and causation to weigh the merits of respondent's claim.

PARTIES TO THE PROCEEDING

Alan Carlisle is an individual and resident of the Commonwealth of Pennsylvania who, until his disability, was a career employee of Petitioner.

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On Writ Of Certiorari
To The United States Court Of Appeals
To The Third Circuit

◆

BRIEF FOR RESPONDENT ALAN CARLISLE

◆

OPINIONS BELOW

In *Carlisle v. Consolidated Rail Corporation*, the opinion of the United States District Court for the Eastern District of Pennsylvania denying Consolidated Rail Corporation's motion for summary judgment (A-106 to A-114) was not officially reported. The district court opinion denying Consolidated Rail Corporation's motion for judgment notwithstanding the verdict or for a new trial (A-115 to A-145) is reported at 790 F.Supp. 521 (E.D.Pa.1992). The opinion of the United States Court of Appeals for the Third Circuit (A-73 to A-90) is reported at 990 F.2d 90 (3d Cir. 1993).

◆

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. Sec. 1254(1). The judgment of the Court of Appeals in *Carlisle v. Consolidated Rail Corporation* was entered on March 29, 1993. The petition for a writ of certiorari under Supreme Court Rule 12.2 was filed on June 9, 1993, and the petition for a writ of certiorari was granted on October 12, 1993.

◆

STATUTORY PROVISION INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. Sec. 51, provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

◆

STATEMENT OF THE CASE

In April of 1974, the Federal Railroad Administration issued "An Analysis of the Job of Railroad Train Dispatcher." It detailed the factors which make this a pressure filled occupation noting that specific sources of dangerous stress were the dependence on memory, inadequate staffing, conflict between management's need for production and safety for the worker and public and the pressure for perfect performance since a mistake could result in substantial tragedy. The dispatcher is responsible for the safety of people and cargo that move on the rail system. He or she must often balance this concern with management's insistence for an on-time delivery. The decision making and evaluation process must occur rapidly, with potential disastrous consequences resulting from a mistake.

The working environment often contributes, rather than ameliorates the inherent difficulties of the job. Poor equipment, excessive noise, inadequate communication facilities, and frequent interruptions compound the dispatcher's stress.

Given the above, it is not surprising that the Analysis, after a review of studies and medical summaries, concluded:

> "As a group, train dispatchers showed an exceptionally high incidence of optical nystagmus, (a jumping of the eyes that reflects fatigue, attributed to frequent scanning of train sheets), deafness (attributed to the then-common use of headphones), diseases involving the heart, blood vessels and kidneys, and a group of symptoms usually associated with neuroses and anxiety states. The average age of death was fifty Years with an exceptionally high rate of deaths due to cardiovascular disease. These conditions were attributed to the stress and strain incident to the rate at which some train dispatchers are called upon to perform their duties . . . Later sets of data (1941 – 1950 and 1951 – 1955) showed a median age of death of about fifty-seven for train dispatchers, as compared to a median age of sixty-five for the general population of white males over age twenty-five . . .
>
> These studies, the complaints heard during our present study, and our observations, all cause us to conclude that the stress associated with the performance of train dispatching duties as they are now carried out is real, severe and potentially damaging to the physical and mental health of the dispatchers."

Mr. Carlisle began as a train dispatcher for Conrail in 1976. By 1981 he had moved into a supervisory position and was responsible for all trains moving in and out of Washington, D.C., Philadelphia and Baltimore and Wilmington. Between 1984 and 1987, the railroad reduced its

work force and increased the responsibilities of its dispatchers. Simultaneously, the data available for making safe decisions with respect to individual trains was reduced by the elimination of tower operators who acted as the eyes and ears of the dispatcher.

In May of 1988, Mr. Carlisle's already extensive job responsibilities shifted and increased. He was additionally assigned train master duties in South Philadelphia while being required, sometimes at the same time, to perform the train dispatching and supervisory responsibilities of his previous position. In addition, due to additional reductions in force, Mr. Carlisle was forced to assume the responsibilities previously covered by those whose jobs were eliminated. He now had to oversee operations in several railroads in Philadelphia and enforce safety rules and act as a troubleshooter. This often involved visits to deserted areas which were isolated and crime ridden. He asked his employer for police protection but was refused, forcing Mr. Carlisle to purchase a gun and carrying it even though he had always been opposed to firearms.

From this period on, Mr. Carlisle was required to work 15 hour days for 6 to 13 consecutive days. In one two-week period he worked in excess of 225 hours. While on the job he was prohibited from taking breaks for rest or even lunch. His supervisor who often exhibited signs of intoxication, verbally abused him while on the job and in front of co-workers and constantly called him at home in the middle of the night screaming at him until the abusive, apparently drunk superior, passed out on the phone. The stress was exponentially multiplied when his Conrail superiors continuously ordered him to ignore safety violations that endangered passengers, workers and freight solely in order to avoid delays.

In 1987 a "Safety Assessment, Consolidated Rail Corporation," was conducted by The Federal Railroad Administration and dealt directly with the conditions at Mr. Carlisle's work place. The report found:

> "Even more disturbing is that the chief dispatcher and assistant chief dispatcher do not have the electronic capability of monitoring the actions of the dispatchers . . .
>
> The dispatching workload at times was excessive to the point that there was an appearance of having made decisions which were not well thought out . . .
>
> Dispatchers worked rest days 267 times during 1986 . . .
>
> The workload factors on both desks are sufficiently high to warrant immediate corrective action by Conrail. Duties not associated with on-track movements should be removed from dispatching responsibility. There is insufficient staff of extra-board dispatchers to provide relief for vacations, personal emergencies or sickness. The division should take the action necessary to assure adequate dispatching personnel are available . . .
>
> FRA found what appears to be a systematic fault within Conrail: too many middle and upper middle managers value 'production' over 'safety' and fail to translate the organizational safety commitment into an effective safety program."

Despite the above, no changes were made in Respondent's work environment.

As conditions on the job deteriorated, Mr. Carlisle began to suffer severe fatigue, day long headaches, and weight loss from 15 to 20 pounds, as the trial court observed, "a significant amount for the not-so-hefty man the court observed at trial." (Trial court opinion, p. 16). He experienced insomnia, bouts of sleepwalking and blackouts to include a sleepwalking incident on the day of his breakdown when his wife found him in a fetal position with a burning cigarette on the floor of his dining room. He also saw co-workers suffer a variety of medical illnesses ranging from heart attacks to nervous breakdowns. Each of these disabled employees had told Conrail of their condition and attributed them to the work place. Both Respondent and his wife registered repeated complaints and requests for assistance, relief and better equipment to the employer which were ignored.

Mr. Carlisle fell into a major depression. His treating psychiatrist, Dr. Real, and internationally known stress expert, Dr. Rosch, unequivocally drew the link between his working conditions and his mental breakdown. In the opinion of both, Respondent's job had caused severe mental and physical health problems. Petitioner's psychiatrist agreed that Mr. Carlisle's illness was caused in part by his work.

◆

SUMMARY OF THE ARGUMENT

Respondent Alan Carlisle was employed as a train dispatcher in an industry that had an obligation under the FELA to provide him with a safe place to work. Despite two separate Federal Railroad Administration reports warning of the hazardous condition of Petitioner's facilities and the threat posed to the physical and mental health of its workers, Conrail took no remedial action. As a result, Respondent suffered a major psychiatric illness accompanied by severe physical symptomology.

The Court of Appeals appropriately found that in a case where the plaintiff is the direct victim of the defendant's negligent acts, the case should be analyzed using traditional tort principles of duty, foreseeability, breach and causation. In doing so, they recognized that some extraordinary safeguards must be adopted in dealing with emotional distress claims. They therefore instructed the lower court to conduct a threshold review of the factual indicia of genuineness of each case.

This test should be approved since it is consistent with common law principles, comports with the analytical ~~approach of a majority of the states~~ and offers sufficient safeguards to insure the integrity of claims.

◆

ARGUMENT

I. THE FELA ALLOWS COMPENSATION TO A WORKER WHO SUFFERS AN INJURY BECAUSE HIS WORKPLACE WAS MAINTAINED IN AN UNSAFE CONDITION WHICH RESULTED IN FORESEEABLE ADVERSE EFFECTS ON HIS PHYSICAL HEALTH.

A. The FELA is a broad remedial statute designed to promote safe working conditions for railway workers.

The FELA provides that every railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . resulting in whole or in part from the negligence of (the railroad)." 45 U.S.C. Sec. 51. This Court has noted: "We have recognized generally that the FELA is a broad remedial statute, and have adopted a standard of liberal construction in order to accomplish (Congress') objectives." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 562 (1987).

A railroad has a clear duty to provide a safe workplace for its employees. *Nivens v. St. Louis S.W.Ry.*, 425 F.2d 114 (5th Cir. 1970); *Sano v. Pennsylvania R.R. Co.*, 282 F.2d 936 (3rd Cir. 1960). As a corollary to this duty the carrier must provide its worker with sufficient assistance in the task assigned to insure that the workplace remains safe. *Blair v. Baltimore & Ohio R.R.*, 323 U.S. 600 (1945). Where the assistance provided is insufficient the railroad is liable for the resulting injury. *Deere v. Southern Pac. Co.*, 123 F.2d 438 (9th Cir. 1941) cert. den'd 315 U.S. 819 (1942). An employee may recover as long as the employer's negligence "played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac.R.R.Co.*, 352 U.S. 500, 506 (1957).

Furthermore, the act does not limit recovery to certain types of injury while excluding others, nor does it limit recovery to damages sustained in a single incident or accident in the work place. *Urie v. Thompson*, 337 U.S. 163 (1949) points out:

> "We recognize, of course, that when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate railroads. Obviously, these were the major causes of injury and death resulting from railroad operations, but accidental injuries were not the only ones likely to occur. And nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage *any injury* 'resulting in whole or in part from the negligence' of the carrier. If such an act can be found, it must be read into the Act by sheer inference . . .
>
> On its face, *every injury* suffered by an employee while employed by reason of the carrier's negligence was made compensable. The wording was not restrictive as to employees covered, the cause of the injury, except that it must constitute negligence attributable to the carrier; *or the particular kind of injury resulting*. To read into this all inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required or *the particular sorts of harm inflicted* would be contradictory to the wording, the remedial and humanitarian purpose, and the

> constant and established source of liberal construction of the Act followed by this Court."

(337 U.S. at 181-82) (emphasis added)

On the issue of which injuries are compensable under the statute, FELA jurisprudence "gleans guidance from common law developments," *Buell*, supra, 480 U.S. at 568, but remains "a federal question, not varying in accordance with the differing conceptions of negligence applicable under statute and local laws . . . " *Urie*, supra, 337 U.S. at 174.

Moreover, the search for appropriate standards of recovery must be conducted while remembering that "(a) primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Buell*, 480 U.S. at 561. "Congress did not intend to create a static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958).

B. The analysis adopted by the Court of Appeals is in accord with common law principles.

As this Court has noted, "While the traditional rule was that a plaintiff could not recover from mental injuries unconnected with actual or threatened impact, the majority of jurisdictions now appear to have abandoned that rule." *Buell*, supra, 480 U.S. at 569, n.20. "Starting with an early Irish decision, the great majority of courts have now repudiated the requirement of impact, regarding as sufficient the requirement that mental distress be certified by some physical injury, illness or other objective physical manifestation." Prosser and Keaton on *The Law of Torts*, Sec. 54 at 364 (5th Ed.1984).

Professor Keaton points to *Payton v. Abbott Labs*, 368 Mass. 540, 437 N.E.2d 171 (1982) as containing a concise statement of the majority rule:

> We therefore conclude on the basis of the preceding analysis, that in order for any of the plaintiffs to recover for negligently inflicted emotional distress, she must allege and prove that she suffered physical harm as a result of the conduct which caused the emotional distress. We answer further that a plaintiff's physical harm must either cause or be caused by the emotional distress alleged and that the physical harm must be manifested by objective symptomology and substantiated by expert medical testimony. Finally, the emotional stress for which the compensation is sought must be reasonably foreseeable; unless a plaintiff proves that the defendant knew or should have known of special factors affecting that plaintiff's response to the circumstances of the case the plaintiff can recover only for that degree of emotional distress which a reasonable person that normally constituted would have experienced under those circumstances. Whether the emotional distress which a plaintiff has alleged to have experienced is reasonable is to be determined by the finder of the fact."
>
> (at 368 Mass pp. 556-557)

The test utilized by the Court of Appeals in the present case appears well within the confines of the above. " . . . Courts of this circuit should engage in an initial review of the factual indicia of the genuineness of a claim, taking into account broadly used common law standards, then should apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim." (Opinion of the Court of Appeals, A-73).

Within this context, it is difficult to reconcile Petitioner's assertion that the Court of Appeals indulged in a "radical departure from common law negligence principles." (Petitioner's brief, pp. 19-20). The heart of their argument is that common law recovery for emotional distress has been limited in most jurisdictions to plaintiffs who suffer a direct physical impact, are placed in a zone of danger of an impact, or are a bystander who witnesses injury to a third party. (Petitioner's brief, pp. 19-20). They then theorize that since Mr. Carlisle's injury did not involve any of the preceding, compensation for his disability would be barred.

The problem with this analysis is that it follows only one line of precedent with a relatively standard fact pattern, a single accident or incident occurs and the plaintiff falls somewhere within the spectrum of direct victim of the negligent act to casual observer of it. What is particularly disturbing is the argument that the "bystander" cases set the common law outer limit for recovery for emotional distress and that "bystander" principles should be applied to the analysis of Respondent's claim.

The question thus becomes whether "bystander" precedent should be applied to a case where the plaintiff is a direct victim of defendant's negligence rather than a witness to it or whether another test is more appropriate. The choice of the analytical framework is crucial to evaluate the common law and precedental foundations of the Court of Appeals' decision.

Rather than force this case into a "bystander" framework, in which it does not belong, it is more appropriate to consider Restatement (Second) of Torts Sec. 436(1):

> If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.

Of particular interest in the present case is the illustration provided by the Restatement (Second) for subsection (1):

> A, employed by B Company, works close to a boiler. On past occasions, the pressure gauge of the boiler has broken, with a loud report and a violent escape of steam. The manager of B Company knows this, and should realize that a repetition of the occurrence is likely to cause shock or fright to any one near the boiler, so extreme as to result in bodily harm. He nevertheless fails to take any precautions. The pressure gauge breaks again, and A is severely shocked and frightened, and as a result suffers an illness which confines her to a hospital for a week. B Company is subject to liability for A's illness.

An illuminating example of this distinction is provided by the development of California law. Prior to *Dillon v. Legg*, 68 Cal.2d 728, 441 P.2d 912, 69 Cal.Rptr. 72 (Sup.Ct. 1968) (en banc) most jurisdictions denied claims for emotional distress flowing from witnessing injury to another. *Dillon*, supra, established a three part test, based on a foreseeability analysis, that permitted bystander recovery.

This decision was not viewed as inconsistent with, or overruling *McMillan v. Western Pacific Railroad Company*, 54 Cal.2d 841, 9 Cal.Rptr. 361, 357 P.2d 449 (1960) which held that a train dispatcher had stated a cause of action when he alleged that the railroad had negligently subjected him to working conditions "of unusual responsibility, stress and tension in that he was required to operate a system of central traffic control of defendant's railroad, which system involved multitudinous and complex mechanical factors and mental decisions, extreme responsibility, constant but shifting attention and numerous clerical functions which imposed an unusual stress and burden upon plaintiff's physical and nervous systems which caused the plaintiff to suffer a severe mental collapse . . . " (at 357 P.2d 449).

Leaving aside that this case is factually similar to the one at hand, the distinction with *Dillon*, supra, was that in *McMillan*, supra, the plaintiff was the direct victim of the employer's negligence. This distinction was made clear in *Molien v. Kaiser Found. Hosps.*, 27 Cal.3d 916, 616 P.2d 813, 167 Cal.Rptr. 83 (1980) which held that *Dillon*, supra, applied only when the "plaintiff {seeks} recovery of damages . . . suffered as a percipient witness to the injury of a third person." 27 Cal.3d at 923, 616 P.2d at 816, 167 Cal.Rptr. at 839.

The danger of this type of mis-analysis was explored by the *Molien*, supra, court. "By insisting that the present facts fail to satisfy the first and second of the *Dillon* criteria, defendants urge a rote application of the guidelines to a case factually dissimilar to the bystander scenario . . . Hence the significance of *Dillon* for the present action lies not in its delineation of guidelines fashioned for resolution of the precise issue then before us; rather, we apply its general principle of foreseeability to the facts at hand, much as we have done in other cases presenting complex questions of tort liability." 27 Cal.3d at 923, 616 P.2d at 816, 167 Cal.Rptr. at 834-835; (citations omitted).

As precedent developed, California courts took the view that direct victim and bystander cases were governed by two distinct theories of recovery. This framework proved cumbersome and was clarified in *Burgess v. Superior Court (GUPTA)*, 2 Cal. 4th 1064, 831 P.2d 1197, 9 Cal.Rptr. 2d 615 (1992). "The law of negligent infliction of emotional distress in California is typically analyzed, as it was in this case, by reference to two 'theories' of recovery: The 'bystander' theory and the 'direct victim' theory." (at 831 P.2d 1199).

"The distinction between the 'bystander' theory and the 'direct victim' cases is found in the source of the duty owed by the defendant to the plaintiff." (at 831 P.2d 1200). Bystander cases "all arise in the context of physical injury or emotional distress caused by the negligent conduct of a defendant with whom the plaintiff had no preexisting relationship, and to whom the defendant had not previously assumed a duty of care beyond that owed to the public in general." (at 831 P.2d 1200)

"In contrast, the label 'direct victim' arose to distinguish cases in which damages for serious emotional distress are sought as a result of a breach of duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, one that arises out of a relationship between the two." (at 831 P.2d 1201)

"We have repeatedly recognized that the negligent causing of emotional distress is not an independent tort, but the tort of negligence. The traditional elements of duty, breach of duty, causation, and damages apply." (at 831 P.2d 1200).

Therefore, when Petitioner lists *Dillon*, supra, in their Appendix as a "bystander" case they are quite correct. The difficulty is that this characterization is irrelevant to the question of what California law or the common law is with respect to a plaintiff emotionally injured as a direct result of the negligence of his employer who owed him a preexisting duty to provide a safe place to work. For that You turn to *McMillan*, supra, a case under which Respondent clearly would recover.

Another example is provided by *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990). Petitioner places this case in the bystander classification but fails to note the lengthy analysis of over one hundred years of North Carolina precedent which led the Court to conclude:

> "Our cases have established that to state a claim for negligent infliction of emotional distress, a plaintiff must allege that {1} the defendant negligently engaged in conduct, {2} it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as mental anguish) and {3} the conduct did in fact cause the plaintiff severe emotional distress. *See, e.g., Bailey v. Young,* 172 N.C. 661, 90 S.E. (1916); *Green v. Telegraph Co.,* 136 N.C. 489, 49 S.E. 165 (1904); *Young v. Telegraph Co.,* 107 N.C. 370, 11 S.E. 1044 (1890). Although an allegation of ordinary negligence will suffice, a plaintiff must allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice. *E.G., Hancock v. Telegraph Co.,* 137 N.C. 497, 500-501, 49 S.E. 952, 953 (1905). In this context, the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."
>
> (395 S.E.2d at 97)

North Carolina indeed does have a "bystander" rule, but they also have a test that deals with plaintiffs who are emotionally injured directly by the negligence of the defendant. That test embodies the traditional notions of duty, foreseeability, breach and causation, and is consistent with that approved by the Court of Appeals in the present case.

Petitioner also cannot draw support from precedent placed in their "zone of danger" category, again because of the factual dissimilarities to the case at hand. For example, they place *Tobin v. Grossman,* 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) in this classification. The New York courts themselves have recognized that it has no value when analyzing cases where the plaintiff is the direct victim of the negligence and where a preexisting duty of care was present. In *Johnson v. State,* 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (Ct.App.1975) the Court noted:

> "In the *Tobin* case, the court held that no cause of action lies for unintended harm sustained by one, solely as a result of injuries inflicted directly upon another, regardless of the relationship and whether the one was an eyewitness to the incident which resulted in the direct injuries (p. 611, 301 N.Y.S.2d pp. 554-555, 249 N.E.2d pp. 419-420). In this case, however, the injury was inflicted by the hospital directly on claimant by its negligent sending of a false message announcing her mother's death. Claimant was not indirectly harmed by injury caused to another; she was not a mere eyewitness of or bystander to injury caused to another. Instead, she was the one to whom a duty was directly owed by the hospital, and the one who was directly injured by the hospital's breach of that duty. Thus, the rationale underlying the *Tobin* case, namely, the dangers of extending recovery for harm to others than those directly involved, is inapplicable to the instant case."
>
> (334 N.E.2d at 593)

A second step in evaluating whether the court of appeals took a "radical" approach or utilized mainstream analytical tools to decide this case is to recognize the distinction between negligent acts that result in insubstantial and emotional injury and those where the psychological trauma is severe. This distinction is critical since many courts utilize this test to insure the validity of claims and to prevent trivial or insignificant complaints. It is also a device which acts as a check on the flood of litigation feared by Petitioner.[1]

In the instant case, the Court of Appeals appreciated the difference and noted:

> "The injury here to Carlisle was emotional, accompanied by obvious manifestations. We do not face and we do not decide the issue of whether purely emotional injury, caused by extended exposure to stressful, dangerous working conditions would be compensable under the F.E.L.A." (A-73, n.11)

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[1] Petitioner and various Amici Curiae argue that emotional injuries, often based on psychiatric testimony, are difficult to evaluate and may lead to spurious claims. The difficulty with this proposition is that juries routinely decide issues of pain, suffering and emotional distress in the physical impact, zone of danger and bystander cases as well as many other tort cases. The argument really is one against a category of damages long recognized at common law, rather than an argument peculiar to the tort of negligent infliction of emotional distress.

Moreover, the Court of Appeals test adopted in this case explicitly directs the judge to engage in an initial review of the factual indicia of the genuineness of a claim. Nothing in this analytical approach deprives the trial court of the tools to safeguard against specious litigation.

Therefore, when Petitioner relies on Restatement (Second) of Torts Sec. 436A comment (b) (1965) for the proposition that imposing liability for emotional distress may open the floodgates to fraudulent or inconsequential claims, they neglect the cure provided in the subsequent comment to the same section:

> "The Rule stated in this Section applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage and humiliation. The fact that these are accompanied by transitory, nonrecurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character. This becomes a medical or psychiatric problem, rather than one of law.
>
> (Sec. 436A comment (c)).

The development of the law in this area is capsulized in *Payton v. Abbot Labs,* supra:

> "The Restatement (Second) of Torts Sec. 436A (1965) sets forth what is still the rule adhered to by the majority of American courts: 'If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another and it

> results in such emotional damage alone without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.' The cases generally hold that physical harm is required but (in accordance with the Restatement (Second) of Torts Sec. 436(2) (1965)) the harm need not be caused by impact or trauma; *physical harm resulting from emotional stress is sufficient."*
>
> (at 368 Mass. 552) (emphasis added)

While many jurisdictions have not felt the need for a "physical manifestation" test, virtually all that do not, require that the emotional injury be severe. See *Johnson v. Ruark Obstetrics,* supra ("mere temporary fright, disappointment or regret will not suffice," 395 S.E.2d at 97); *Rodrigues v. State,* 52 Haw. 156, 472 P.2d 509 (1970) ("serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." 472 P.2d at 520). *Burgess v. Superior Court (GUPTA),* supra ("Moreover, even if Burgess had failed to allege physical injuries, physical injury is not a prerequisite for recovering damages for serious emotional distress especially when, as here, there exists guarantee in the circumstances of the case." at 831 P.2d 1205.)[2]

---

[2] The failure to appreciate this jurisprudence also leads to Petitioner's misleading assertion that Respondent would not recover under the workmen's compensation statutes of most states. This simply is not true. See, 1B Arthur Larson, *The Law or Workmen's Compensation* Sec. 42.23 (1987). There is ample precedent to grant workmen's compensation absent an accident involving physical injury but with serious emotional or psychiatric repercussions. See, *Goyden v. State Judiciary,* 256 N.J. Super

In this context the Court of Appeals' holding that the "genuineness" of the emotional injury should be evidenced by "factual indicia" within the definition of "broadly used common law standards" is clearly within

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438, 607 A.2d 651 (App.Div. 1991), aff'd. 128 N.J. 54, 607 A.2d 622 (1992) ("for a worker's mental condition to be compensable the working conditions must be stressful, viewed objectively, and the believable evidence must support a finding that the worker reacted to them as stressful. In addition, for a present day claimant to succeed, the objectively stressful working conditions must be 'peculiar' to the particular workplace and there must be objective evidence supporing a medical opinion of resulting psychiatric disability in addition to the bare statement of the patient."); *Hammerle v. Workmen's Compensation Appeal Board (Department of Agriculture, Bureau of Dog Law Enforcement),* 88 Pa. Cmwlth. 486, 490 A.2d 494 (1985) (a work-related mental illness which does not follow a physical injury can be a compensable injury); *Levine v. Workmen's Compensation Appeals Board,* 70 Cal.3d 66, 137 Cal.Rptr. 129 (1977) (compensation awarded where wife develops depressive neurosis and anxiety from husband's dismissal by their mutual employer); *Wolfe v. Sibley, Lindsay and Curr Co.,* 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603 (1975) (claimant who suffered severe depression requiring hospitalization due to suicide of her immediate supervisor had a valid workmen's compensation claim); *Ferguson v. HDE Inc.,* 270 So.2d 867 (La. 1973) (A valid workmen's compensation case stated when claimant suffered a stroke while arguing about his paycheck); *Klimas v. Trans Caribbean Airways, Inc.,* 10 N.Y.2d 209, 219 N.Y.S. 2d 14, 176 N.E.2d 714 (1961) (compensation awarded when executive suffers a heart attack due to delays and mounting costs in a project for which he was responsible); *In the Matter of Gray Trust, ECAB,* Doc. No. 61-131, May 11, 1961 (compensable injury where an embassy employee collapses as a result of sustained fear of mob violence); Larson, supra, Sec. 42.23(b) (" . . . that the stimulus is gradual, in the form of sustained stress, tension, worry, strain, frustration, or harassment, does not . . . make nervous injury any less compensable that if it were caused by sudden shock.")

the mainstream of precedent. Moreover, the application of traditional tort principles of duty, foreseeability, breach and causation represent the analytical approach most appropriate to the facts of this case.

An application of these principles to Respondent's situation, as the jury was instructed to do, leads to the conclusion that Mr. Carlisle adequately proved his case. Petitioner had a long established and preexisting duty to provide Mr. Carlisle with a "safe place to work." *Nivens v. St. Louis S.W.Ry.* That duty included providing sufficient mechanical and human assistance to insure that his task could be performed without injury. *Blair v. Baltimore & Ohio R.R.; Yawn v. Southern Ry. Co.*, 591 F.2d 312 (5th Cir. 1979).

The fact that the workplace was unsafe and posed a foreseeable risk of serious injury to its workers, was brought directly home to Petitioner by two Federal Railway Administration reports which documented the stressful nature of a train dispatcher's job, the outdated equipment and hazardous working conditions at Respondent's office, and the adverse effect of the situation on the physical and mental health of the employees. Petitioner was also aware that serious problems, including cardiac arrest and nervous breakdowns, had occurred among Mr. Carlisle's fellow workers. Respondent himself passed on other employees' complaints about conditions and expressed his own concerns about job related stress and inadequate support.

Nonetheless, Conrail breached its duty to Respondent by taking no action to ameliorate the hazardous condition or to make the workplace safe. The causal

connection between this breach and the resultant physical, symptomology and emotional illness was amply supported by expert medical and psychiatric testimony to include Petitioner's own psychiatric expert and consistent with the effects predicted by The Federal Railway Administration reports.

In the end, the question for this Court is a simple one: should cases similar to that of Respondents go to the jury for decision? The oft quoted Dean Prosser provides some advice in *Palsgraf Revisited*, 52 Mich.L. Rev. 1 (1953) when he commends the reader to *Jackson v. B. Lowenstein and Bros.*, 175 Tenn. 535 at 538, 136 S.W.2d 495 (1940):

> "{The Palsgraf Case}, by virtue of the sharp difference of opinion of the judges, should be a warning to appellate courts not lightly to assume the primary duty of the determining liability or non-liability, in actions of tort, but leave that duty where the constitution has placed it, with the jury, as triers of facts, and if they act capriciously and arbitrarily to supervise their action."

This point has special significance under the congressionally enacted, to be liberally construed, FELA. Under the FELA, the question is " . . . simply whether the proofs justify with reason the conclusion that {railroad} employer negligence played any part, even the slightest, in producing injury . . . for which damages are sought." *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 506 (1957). Moreover, the Third Circuit, commenting on the *Rogers* standard, stated in *Albergo v. Reading Company*, 373 F.2d 83, 85 (3rd Cir. 1966) cert. den'd 386 U.S. 983 (1967) "the evidence may be minimal but it must be sufficient to provide the jury with some rational basis for concluding that some negligence of the railroad proximately contributed to the {injury}."

C. Recovery for severe emotional injury is not barred by the Railway Labor Act.

Petitioner raises an issue not briefed or argued to the Court of Appeals, nor included in their Writ of Certiorari. They suggest that recovery for emotional injuries is barred under the FELA since the claim may fall within the arbitration provisions of the Railway Labor Act (RLA) 44 State. 577, as amended, 45 U.S.C. Sec. 151 et seq.

This argument was raised and explicitly rejected by this Court in *Buell,* supra which held that emotional injury claims by railway workers fall within the FELA, but reserved decision on the parameters of such claims.

◆

CONCLUSION

For the foregoing reasons, Respondent Alan Carlisle respectfully requests that, as to *Consolidated Rail Corporation v. Carlisle,* this Court affirm the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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FOR ARGUMENT

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In The

Supreme Court of the United States

October Term, 1993

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Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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REPLY BRIEF FOR PETITIONER

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[*] The information concerning the Parties to the Proceeding and Designation of Corporate Relationships set forth at page ii of Petitioner's Brief on the Merits currently is accurate and is incorporated by reference herein.

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No. 92-1956

In The

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On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

Respondents attempt to defend on three basic grounds the expansive foreseeability test adopted by the court of appeals – a test under which any railroad employee who experiences stress from general working conditions may state a claim for negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA"). Respondents: (1) point to the "broad remedial purpose" of the FELA as justification for the judicial creation of a test for negligent infliction of emotional distress under the FELA that is broader than any test generally recognized at common law; (2) attempt to discredit the well-established common law policies supporting restrictions on the tort of negligent infliction of emotional distress and their applicability to the FELA; and (3) defend the court of appeals' decisions by asserting that they are well-grounded in the common law, a proposition that the court of appeals itself rejected. Respondents' arguments are unconvincing for several reasons.

First, the broad remedial purpose of the FELA does not and cannot alone provide a meaningful basis for decision in these cases. Other countervailing policies strongly counsel against exposing an FELA employer to virtually unlimited liability for the general stresses of inherently stressful jobs.

Second, the policy considerations that have convinced virtually every common law court to place limits on causes of action for negligent infliction of emotional distress remain viable and are equally (and in some instances more) applicable to the FELA.

Third, respondents could not recover for their emotional distress at common law, and, accordingly, their attempts to defend the court of appeals' decisions, if not their reasoning, on common law grounds are unfounded. Indeed, respondents' efforts in this regard are indicative of their own implicit concern that the court of appeals' broad foreseeability test is unsupportable and unworkable.

ARGUMENT IN REPLY

I. THE BROAD REMEDIAL PURPOSE OF THE FELA DOES NOT JUSTIFY THE COURT OF APPEALS' ADOPTION OF AN EXPANSIVE FORESEEABILITY TEST FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

To defend the court of appeals' adoption of an expansive foreseeability test for negligent infliction of emotional distress,[1] both Gottshall and Carlisle emphasize the "broad remedial purpose" of the FELA. *See, e.g.*, Gottshall Brief at 12-13; Carlisle Brief at 9-11. That rationale does not, however, automatically justify imposing a new duty on FELA employers to protect their employees from emotional distress. Rather, as discussed in Conrail's opening brief, the broad remedial purpose of the FELA was to make whole the victim of the physical dangers of railroad work.

Indeed, important countervailing policies counsel against creating a broad tort duty under which virtually any railroad worker might state a claim for workplace stress. These policies include the complete lack of statutory support suggesting that Congress intended to impose on FELA employers a duty to protect their employees from emotional distress; the far-sweeping effect such a duty would have on the employment relationship; and the availability of other congressional remedies, such as the Railway Labor Act ("RLA"), to address working conditions in the railroad industry. Focusing solely on the undifferentiated "broad remedial purpose" of the FELA, respondents ignore these other policies entirely.

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[1] While the court of appeals' test for negligent infliction of emotional distress requires genuineness in addition to foreseeability, Conrail Brief at 22-24, given the relative ease of demonstrating genuine emotional distress, even Gottshall refers to the approach of the court of appeals as a "foreseeability-based approach." *See* Gottshall Brief at 43.

In the context of other federal statutes, this Court has cautioned that "the creation of new rights ought to be left to legislatures, not courts." *Musick, Peeler & Garrett v. Employees Ins.*, 113 S. Ct. 2085, 2088 (1993). Moreover, the Court explicitly has held that generalized references to the broad remedial purpose of a statute – such as those advanced by Gottshall and Carlisle – do not "justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.' " *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (quoting *SEC v. Sloan*, 436 U.S. 103, 116 (1978)); *see also Aaron v. SEC*, 446 U.S. 680, 695 (1980).

The statutory language and the legislative history of the FELA discussed in Conrail's brief on the merits, *see* Conrail Brief at 12-13; 16-19, make clear that Congress enacted the FELA because of its concern with the physical dangers of railroading. The statute removed certain specific common law defenses (such as assumption of the risk) in order to broaden railroad workers' remedies for physical injuries, but there is no evidence whatsoever either in the language of the statute or in its legislative history that Congress intended to impose a new and expansive tort duty on FELA employers to protect their employees from emotional distress. In the absence of clear congressional intent, it would be particularly inappropriate to impose a broad tort duty in the employment relationship, particularly an employment relationship regulated by Congress through another federal statute, the RLA.

Indeed, although Gottshall points to decisions in Virginia and Ohio as applying expansive remedies for negligent infliction of emotional distress, *see* Gottshall Brief at 22-23, those very states disallow recovery for negligent infliction of emotional distress in employment cases. *See Chesapeake & Potomac Tel. Co. v. Dowdy*, 235 Va. 55, 365 S.E.2d 751 (1988); *Penn v. Rockwell Int'l Corp.*, 48 Fair Empl. Prac. Cas. (BNA) 624 (S.D. Ohio 1988); *Oldfather v. Ohio Dep't of Transp.*, 653 F. Supp. 1167 (S.D. Ohio 1986), *appeal dismissed*, 816 F.2d 681 (6th Cir. 1987).

Unlike the doctor-patient relationship, in which some courts have found that a doctor owes a duty to a patient to avoid causing emotional distress, *see infra* pp. 18-19, the employment relationship is not one where such a duty should be imposed without clear congressional guidance. As the California Supreme Court noted with respect to the question of whether tort remedies should be interposed into the employment relationship, "[s]uch a determination, which has the potential to alter profoundly the nature of employment, the cost of products and services, and the availability of jobs, arguably is better suited for legislative decision making." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 694, 765 P.2d 373, 397, 254 Cal. Rptr. 211, 235 (1988); *see also Soules v. Cadam Inc.*, 2 Cal. App. 4th 390, 404, 3 Cal. Rptr. 2d 6, 14 (1992); *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wash. 2d 426, 447-48, 815 P.2d 1362, 1373-74 (1991). Despite their persistent references to the "broad remedial purpose" of the FELA, neither Gottshall nor Carlisle is able to demonstrate that this quantum leap in the law was one intended by Congress.

Moreover, in the railroad industry Congress expressly has provided a forum for the airing of disputes concerning working conditions, rendering the imposition of liability for workplace stress even more inappropriate. As Gottshall concedes, "[r]ailroad employees upset with general working conditions, disagreements with superiors and other such routine matters have a ready forum [under the Railway Labor Act] within which to air their grievances." Gottshall Brief at 44; *see also* Conrail Brief at 27-30. The problem with the court of appeals' approach is that it essentially *invites* railroad employees "upset with general working conditions, disagreements with superiors and other such routine matters" to avoid resolving those disputes under the RLA by bringing negligent infliction of emotional distress claims under the FELA.

Conrail's argument is not, as respondent Carlisle suggests, *see* Carlisle Brief at 26, that the RLA bars employee claims for emotional distress. Conrail recognizes that in some situations a cause of action for emotional distress may exist under the FELA. *See Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557 (1987). Conrail's point is only that in defining the parameters of such a cause of action, this Court should take into consideration the availability of the RLA procedures also provided by Congress, just as it should take into account the other policies set forth above and in Conrail's opening brief.

Contrasted with the expansive foreseeability test adopted by the court of appeals and urged by Gottshall and Carlisle, the zone of danger test advanced by Conrail takes into account the remedial purpose of the FELA, the duty imposed by Congress under the FELA, and the nature of the railroad employment relationship. Congress clearly intended to impose a duty on railroad employers to protect their employees from the physical dangers of railroad work. Under a zone of danger test, those employees who do not suffer a physical impact, but who are within the zone of danger of such an impact, may be able to recover for their genuine emotional distress from the breach of this preexisting duty.

Thus, the zone of danger test takes into account the broad remedial purpose of the FELA by recognizing emotional distress as a cognizable injury under the FELA and, accordingly, is consistent both with common law developments and with *Urie v. Thompson*, 337 U.S. 163 (1949), where this Court looked to the FELA's broad remedial purpose in recognizing silicosis as a type of injury covered by the statute. However, the zone of danger test also contains liability in a manner consistent with a railroad employer's statutory duty, in recognition of the countervailing policies that also must be considered in determining the parameters of an employer's duty.

II. THE POLICIES THAT SUPPORT RESTRICTING RECOVERY UNDER THE COMMON LAW FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS REMAIN VALID AND APPLY WITH AT LEAST EQUAL FORCE TO THE FELA.

Because of this Court's instruction in *Buell*, 480 U.S. at 568, to "glean[] guidance from common-law developments" in evaluating negligent infliction of emotional distress claims under the FELA, both Conrail and amici have described the profound policies motivating the common law's limitation of the tort of negligent infliction of emotional distress. Carlisle completely ignores these policies; Gottshall asserts that all but one of them have been discredited and that the remaining policy does not apply to the FELA. Gottshall is wrong on both counts.

While erroneously asserting that most of the common law policies have been discredited (a point discussed *infra*), Gottshall concedes, as he must, that the pervasive common law concern with unlimited liability that has prompted many courts to restrict recovery for negligent infliction of emotional distress remains "justified." Gottshall Brief at 27. This is a critical concession because the fundamental problem with the court of appeals' general foreseeability test is that it does not provide any workable limits on liability for negligent infliction of emotional distress under the FELA.

In his efforts to downplay this serious problem, Gottshall makes the novel argument that "[w]hatever the potential of bystander and other 'foreseeability' tests to extend tortfeasor liability to remote and unforeseeable plaintiffs in the context of state common law, there is no such possibility in the context of the FELA." Gottshall Brief at 39-40.

However, the reasons that Gottshall offers to support this assertion are meritless. Gottshall contends, for example, that the FELA by its own terms contains the requisite limitation on liability for negligent infliction of emotional distress because the FELA applies only to railroad employees. Gottshall Brief at 40. In view of the fact that there are in excess of a quarter of a million railroad employees in the country, *see* American Association of Railroads Amicus Brief at 1, it is difficult to fathom how this "limit" is any kind of limit at all.

Perhaps more significantly, the concern with "limiting" liability is not merely a numerical one. Rather, it also involves the nature of the liability: what will trigger it; how predictable it will be; what types of people may recover. Under the court of appeals' decisions, because the railroad employer will be liable for any emotional distress that could have been foreseen, liability will be widespread, unpredictable, and essentially without limit. Many jobs are inherently stressful, and many necessary and legitimate employment decisions, such as transfers, reprimands, terminations, promotions, and even ordinary orders from a superior, undoubtedly will cause emotional distress to some employees.

Moreover, Gottshall's argument that under the facts of his case only employees actually present on the job site could recover for emotional distress, Gottshall Brief at 42-43, far from being self-evident from the decisions is, in fact, inconsistent with the general foreseeability approach adopted by the court of appeals. It surely is as "foreseeable" that Gottshall would have suffered emotional distress had Gottshall been working on a different job site and learned of the circumstances of Johns' death as it was "foreseeable" that Gottshall would suffer emotional distress working on the same job site. In addition, by focusing solely on his particular fact pattern, Gottshall ignores the myriad of emotional distress cases that could be brought under the *Gottshall* holding, such as the court of appeals' very first application of *Gottshall* in *Carlisle*, where a train dispatcher was permitted to recover for workplace stress.

Gottshall further attempts to contain the radical ramifications of the court of appeals' general foreseeability test by pointing to "an FELA plaintiff's burden of proving traditional negligence elements of duty, breach of duty, causation and injury" as providing appropriate limits. Gottshall Brief at 39. However, common law courts have refused to adopt expansive foreseeability tests for negligent infliction of emotional distress despite the fact that some courts have stated that the burden of proving causation is less under the FELA than it is under the common law. *See, e.g., Gottshall,* App. at A-27. Thus, the reduced burden under the FELA clearly does *not* provide a meaningful limit on FELA negligent infliction of emotional distress claims. To the contrary, it provides all the more reason to limit such claims under the FELA.

Similarly unconvincing is Gottshall's contention that the court of appeals' adoption of a foreseeability test actually imposes a limited duty because, due to their different psychological make-ups, "few railroad employees will suffer the type of serious emotional injuries necessary to expose carriers to large liability awards." Gottshall Brief at 43. Damage awards under the FELA – and indeed under any negligence system – are intended to encourage defendants to alter their behavior to avoid further adverse awards. *See* Conrail Brief at 36-37, 42. Gottshall's suggestion that emotionally fragile employees should be permitted to recover under the FELA would force employers to conform their conduct to the possible reaction of the most emotionally fragile of their employees. *See* Conrail Brief at 24-25. Accordingly, far from having a limited effect, recognition of such a duty would impact upon all employees and all of the employer's operations. For this reason, a railroad's liability under a federal statute enacted to promote railroad safety should not depend on factors totally outside of the railroad's control such as the emotional sensibility of any particular employee.

Moreover, Gottshall simply is wrong that the common law policy considerations other than the concern

with unlimited liability have been discredited. While recognizing that they may not be insurmountable, numerous courts and commentators continue to credit the policies traditionally offered for limiting the tort of negligent infliction of emotional distress, including the potential for fraudulent claims, the fear of a flood of lawsuits, and the concern that medical science is ill-equipped to determine causation and damages. *See, e.g., Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 424 (3d Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991); *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559, 566 (La. 1990); *Sullivan v. Boston Gas Co.*, 414 Mass. 129, 132, 605 N.E.2d 805, 807 (1993); *see also* Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 Ariz. L. Rev. 439, 465-76 (1992); Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 Wash. L. Rev. 1, 15-17 (1992).[2]

In addition to the policies discussed by Gottshall, a number of other policies inform the common law's reluctance to allow broad recoveries for emotional distress, including: (1) the inability of monetary damages to redress emotional injuries, *see, e.g., Thing v. La Chusa*, 48 Cal. 3d 644, 665, 771 P.2d 814, 828-29, 257 Cal. Rptr. 865, 878-79 (1989); (2) the concern that defendants more efficiently can conform their conduct to avoid physically injuring plaintiffs than they can conform their conduct to meet the emotional demands of others, *see, e.g.*, Crump, *supra* p. 11, at 461; (3) the view that in a civilized society, emotional distress may be a more appropriate subject for instruments of social control other than the law, *see, e.g.*, Product Liability Advisory Council, Inc. Amicus Brief at 6-7 (citing Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1035 (1936)); and (4) the fear of over deterrence of beneficial conduct resulting from the compensation of emotional distress claims, *see, e.g.*, Crump, *supra* p. 11, at 461-62.

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[2] This Court has recognized very similar policies in the context of establishing the reach of other federal statutes where congressional intent was vague. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2763-65 (1991); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-44 (1977); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-48 (1975). Significantly, this Court imposed restrictions on the scope of a plaintiff's rights in each of these cases despite the fact that the securities laws and the antitrust laws – like the FELA – have broad remedial purposes. *See, e.g., Blue Chip Stamps*, 421 U.S. at 748 (securities laws); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (antitrust laws), *quoted in Illinois Brick*, 431 U.S. at 748-49 (Brennan, J., dissenting).

Thus, in considering the scope of a cause of action for negligent infliction of emotional distress under the FELA, this Court should consider all of the common law policies discussed in Conrail's opening brief and the briefs of the amici. These policies counsel against a limitless foreseeability test for negligent infliction of emotional distress and in favor of an approach such as the zone of danger test that consistently and fairly balances all of the interests at stake.

III. RESPONDENTS' ATTEMPTS TO DEFEND THE COURT OF APPEALS' DECISIONS AS ROOTED IN THE COMMON LAW ARE UNFOUNDED.

Despite their rhetoric concerning the broad remedial purpose of the FELA and the inapplicability of the common law policies restricting liability for emotional distress, both respondents strain to demonstrate that they

may recover under recognized common law theories and, thus, that the court of appeals' holdings actually are narrowly circumscribed. However, the fact is that the court of appeals itself recognized that respondents could not recover under the common law; it was this recognition that prompted it to "discard[]" all of the traditional common law limitations. *See Gottshall*, App. at A-30. Respondents' attempts now to fit their claims into clearly inapplicable common law theories only emphasize that they, too, recognize that by "discard[ing]" the common law tests in favor of a general foreseeability test, the court of appeals simply extended liability too far.

Gottshall persists in defending the court of appeals' decision that he was entitled to recover for emotional distress as having a "solid basis" in the common law, arguing that his circumstances satisfy not one, but at least three, common law tests. Gottshall Brief at 29-34.[3] Gottshall first contends that he could recover pursuant to the common law bystander test. *See* Gottshall Brief at 30 &

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[3] Gottshall's suggestion that the court of appeals found a "solid basis" in the common law permitting him to recover, Gottshall Brief at 29-30, is misleading. The court of appeals devoted over ten pages of its opinion to explaining why it would *not* rely on the common law in evaluating FELA negligent infliction of emotional distress claims. *Gottshall*, App. at A-24 to A-35. In explaining its newly created test in FELA cases, it then stated that, in determining whether the facts "provide a threshold assurance that there is a likelihood of genuine and serious emotional injury," "one consideration is whether plaintiff has a 'solid basis in the present state of common law to permit him to recover.' " *Id.* at A-35, A-36 (citation omitted). Subsequently, the court determined that the factual circumstances of Gottshall's case satisfied certain selected elements of the common law bystander test and thus helped to provide a "threshold assurance" of genuineness, even though Gottshall could not have recovered under the common law.

n.14. However, it is absolutely clear that the common law does not allow recovery for emotional distress caused by witnessing the death of a close friend. Indeed, one of Gottshall's cases, *Dunphy v. Gregor*, 261 N.J. Super. 110, 123, 617 A.2d 1248, 1255 (App. Div. 1992), although urging flexibility with respect to the familial relationship prong of the bystander test, specifically cautions against providing a remedy for the ordinary emotional distress suffered by friends of an injured or deceased victim. This conclusion is consistent with that of other courts that specifically have rejected recovery by friends for their emotional distress as bystanders. *See, e.g., Dierker v. Gypsum Transp., Ltd.*, 606 F. Supp. 566, 568 (E.D. La. 1985); *Kately v. Wilkinson*, 148 Cal. App. 3d 576, 579, 195 Cal. Rptr. 902, 903 (1983).

Gottshall's attempt to contain and defend the court of appeals' decision as satisfying the common law zone of danger test, Gottshall Brief at 32, likewise is unavailing. It is clear that the zone of danger test requires a threat of an actual physical impact, not merely a generalized risk of a physical injury. *See, e.g., Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 425 (3d Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991); *Lancaster v. Norfolk & Western Ry.*, 773 F.2d 807, 813 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987); *see also Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 555-56, 457 N.E.2d 1, 5, 75 Ill. Dec. 211, 215 (1983); *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980); Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 489 (1982). Gottshall's attempt to rephrase the zone of danger test in such a manner as to eliminate the physical impact requirement completely destroys its utility as a limitation on an employer's liability.

Gottshall also relies on what he terms the "active participant" test. Gottshall Brief at 31. However, the so-called "active participant" test is not a common law test at all, but, rather, finds its source in a single district court FELA decision. *See Althoff v. Consolidated Rail Corp.*, No. 87-4384, 1988 WL 61734 (E.D. Pa. June 13, 1988). *Althoff* is the only court ever to have permitted recovery on an "active participant" theory; indeed, similar theories have been rejected by common law courts. *See, e.g., Huggins v. Longs Drug Stores California, Inc.*, 6 Cal. 4th 124, 132-33, 862 P.2d 148, 24 Cal. Rptr. 2d 587, 592-93 (1993); *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 506, 448 N.E.2d 1332, 1335, 462 N.Y.S.2d 421, 424 (1983). In any event, Gottshall in fact is not an "active participant" in the *Althoff* sense because he did not cause his co-worker's death as did the *Althoff* plaintiff, who operated a crane that released a piece of timber that killed a co-worker.[4]

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[4] Elsewhere in his brief, Gottshall asserts that a minority of states applies either a physical manifestation or a general foreseeability test for negligent infliction of emotional distress. *See* Gottshall Brief at 23-24. However, much of the authority that Gottshall cites does not ultimately support his contention. For instance, Gottshall includes cases from California, Maine, Missouri, and Washington in these two fringe categories of negligent infliction of emotional distress cases. However, subsequent cases in each of these jurisdictions severely curtailed the broadest implications of the cases he cites. *See* Conrail Brief at 39-40 (discussing retreat in California); *see also Cameron v. Pepin*, 610 A.2d 279 (Me. 1992); *Asaro v. Cardinal Glennon Mem. Hosp.*, 799 S.W.2d 595 (Mo. 1990); *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 787 P.2d 553 (1990). Thus, the minority position that Gottshall portrays as the progressive approach to negligent infliction of emotional distress claims actually is falling more and more out of favor as courts realize that such broad tests do not place adequate limits on a defendant's liability.

Like Gottshall, respondent Carlisle struggles mightily to defend the court of appeals' result as being in accordance with the common law. Carlisle, however, devotes virtually his entire brief to the proposition that common law negligent infliction of emotional distress precedent relied on by the court of appeals and discussed in Conrail's opening brief is inapposite because he is the "direct victim" of the alleged negligence. Presumably, according to Carlisle, the court of appeals' general foreseeability test applies only in such "direct victim" cases, thereby providing the necessary limit on negligent infliction of emotional distress claims.

The problem with Carlisle's approach is that the direct victim theory is a theory that the court of appeals never even mentions, much less relies upon; that has been criticized as analytically unsound; that never has been applied in FELA cases; that, at best, is a minority view applied in certain limited circumstances not applicable here; and that has been restricted even in California – the state upon which Carlisle primarily relies and the state that has had the most experience with the theory.

Carlisle's contention that there are two lines of precedent, one for bystanders and another for direct victims, and that Conrail improperly has relied on the bystander line of authority, Carlisle Brief at 13-14, is quite remarkable. Indeed, to make this argument, Carlisle completely misstates Conrail's argument by asserting that Conrail relies upon a bystander line of authority. *Id.* at 13. However, Conrail maintains that only those employees in the zone of danger of physical impact – not bystanders – should be able to bring claims under the FELA. It is difficult to see how Carlisle can deny that persons within the zone of danger are direct victims in view of the fact

that the basis of the cause of action for persons within the zone of danger is their "direct" fear of being hit. *See* Conrail Brief at 20-21. Such injuries are not "indirect" as compared to bystander cases where plaintiffs recover for their distress at seeing *another* person harmed.

Moreover, even in pure bystander cases, the distinction that Carlisle attempts to draw collapses. As one commentator has recognized:

> Under the bystander theory, liability is based on the defendant's ability to foresee that his conduct will cause the *bystander* himself to suffer emotional distress. And a "direct victim" of negligence presumably is any plaintiff who suffers unintentionally caused, foreseeable emotional distress. Therefore, a "bystander" plaintiff, once again, is simply one kind of "direct victim."

Crump, *supra* p. 11, at 464; *see also* Pearson, *supra* p. 14, at 515 (criticizing the distinction between "bystanders" and "direct victims" as "analytically unsound").

Thus, defining a plaintiff to be a "direct victim" does not and cannot justify the imposition of a broad and limitless duty on a defendant to protect a plaintiff from foreseeable emotional distress. *See Boyles v. Kerr*, 853 S.W.2d 593, 597 (Tex. 1993). The case law of California upon which Carlisle relies is instructive because – in cases not cited by Carlisle – California in fact has retreated from the distinction that it initially drew between "direct victims" and bystanders.

One of the principal cases that Carlisle relies upon for the distinction between the bystander and direct victim theories is *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). However, in *Thing v. La Chusa*, 48 Cal. 3d 644, 656, 771 P.2d 814, 831, 257 Cal. Rptr. 865, 872

(1989) (a case not cited by Carlisle), the California Supreme Court severely criticized the *Molien* "direct victim" theory as giving "[l]ittle consideration . . . to the importance of avoiding the limitless exposure to liability." Subsequent cases in California have made clear that the direct victim theory may not be relied upon to create a tort duty in the absence of presence in a zone of danger, satisfaction of the bystander requirements, or the presence of some other legally-imposed duty.

Thus, in *Burgess v. Superior Court*, 2 Cal. 4th 1064, 1074, 831 P.2d 1197, 1201-02, 9 Cal. Rptr. 2d 615, 619-20 (1992), the court recognized that a duty could arise to protect a "direct victim," but concluded that the source of that duty was the physician-patient relationship between Burgess and her doctor. Just a few months ago, emphasizing that the source of the duty in *Burgess* was limited to the special nature of the physician-patient relationship, the California Supreme Court held that a pharmacist did not owe a duty to an infant's parents for their emotional distress caused by the pharmacist's mislabelling of a drug prescribed to the infant. *Huggins v. Longs Drug Stores California, Inc.*, 6 Cal. 4th 124, 131-32, 862 P.2d 148, 24 Cal. Rptr. 2d 587, 591-92 (1993).[5]

The employer-employee relationship is not sufficiently similar to the doctor-patient relationship to support a general duty for an employer to protect employees from emotional distress. Unlike a doctor whose duty is to care for the well-being of the patient, the employer in no sense can be said to undertake such a broad duty to care for employees. Also unlike a doctor who makes individualized decisions with respect to each patient, an employer often must make general policy decisions applicable to all of its employees. Finally, the employer-employee relationship is not one that should support an independent duty of the employer to protect its employees from emotional distress, particularly where Congress already has defined the duty, and where at common law the courts have shied away from imposing such a duty. *See supra* pp. 4-6.

In short, both respondents implicitly concede the importance of limits on recovery for negligent infliction of emotional distress by attempting to force the factual circumstances of their cases into common law tests that do not apply or do not exist. As a result, the limits to which they point are wholly illusory. As set forth in Conrail's opening brief and further articulated here, the proper standard for negligent infliction of emotional distress under the FELA – the one that most accords with the purposes of the FELA; with the development of the common law; with the preexisting duty that railroad employers owe their employees to protect them from the physical dangers of railroad work; and with the realities of the employment relationship – is the zone of danger test.

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[5] In addition to the California cases, Carlisle cites section 436(1) of the *Restatement (Second) of Torts* as evidence of the existence of a broad tort duty owed to "direct victims." *See* Carlisle Brief at 14. He does not, however, cite any cases or other authorities that interpret section 436(1) to allow a broad tort duty to protect "direct victims" from emotional distress or to permit employees to recover for emotional distress arising from the general stresses of their jobs. In fact, the cases rarely discuss section 436(1) at all. This absence of case law may be because the American Law Institute adopted the Restatement in 1965, three years before the California Supreme Court decided *Dillon v. Legg*, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), and, thus before the courts had any real experience with the dangers of a broadly-defined tort of negligent infliction of emotional distress.

CONCLUSION

For all of the foregoing reasons and those set forth in its opening brief, petitioner Consolidated Rail Corporation respectfully requests that, as to *Consolidated Rail Corporation v. Gottshall*, this Court reverse the judgment of the Court of Appeals for the Third Circuit and remand with instructions to affirm the district court's entry of summary judgment for Conrail; and, as to *Consolidated Rail Corp. v. Carlisle*, this Court reverse the judgment of the Court of Appeals for the Third Circuit and remand with instructions for the court of appeals to remand to the district court with instructions to enter judgment as a matter of law for Conrail.

Respectfully submitted,

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No. 92-1956

IN THE

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

Pursuant to Rule 37.4 of the Supreme Court Rules, the Association of American Railroads (AAR) moves for leave to file the attached Brief of *Amicus Curiae* in support of petitioner. Respondents James E. Gottshall and Alan Carlisle have refused consent to the filing of this Brief.

AAR is a voluntary, nonprofit, incorporated trade association. Its members constitute the vast majority of the nation's railroads, operating approximately 76 per cent of the total line-haul mileage, producing approximately 91 per cent of the freight revenues, and employing approximately 90 per cent of the railway work force in the United States, which numbers in total about 260,000 employees. AAR represents its members before courts, agencies and the Congress on matters of general concern to the railroad industry.

Working conditions for railroad employees today are safer than they have ever been before.[1] However, AAR members spend almost one billion dollars annually under the Federal Employers Liability Act (FELA) to compensate employees who are hurt on the job. This amount has been increasing steadily in recent years despite a continued decline in injuries.[2] Thus, any judicial decisions which expand the scope of compensable injury under FELA to include work-related emotional stress by a railroad employee are of material interest and concern to AAR.

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[1] According to the U.S. Dept. of Transp., Federal Railroad Administration, *Accident/Incident Bulletin*, 66,924 injuries were reported by railroad employees in 1979. By 1992 the number of reported injuries dropped to 17,755. Although the number of railroad employees also had decreased (from 487,534 to 235,834), as well as the number of manhours worked (from 1077 million to 517 million), these figures show that the injury rate per million manhours declined from 62.23 to 34.34. *See also* The Bureau of Labor Statistics, *Occupational Injuries and Illnesses in the United States* 2,18,75 (1991) rating railroad work safer, 7.6 injuries per 100 full-time workers (200,000 man hours), than the average for all industries (7.9), or than trucking (14.5), water transportation (11.6), or air transportation (14.0).

[2] In 1979, railroads paid $296,000,000 in FELA claims. Association of American Railroads, *1979 Claims and Litigation Report* (1980). In spite of steadily decreasing railway injuries (see footnote 1 *supra*), the amount paid in 1992 had increased to $963,000,000. *See 1992 Claims and Litigation Report* (1993).

The two decisions of the Third Circuit now before this Court, if allowed to stand, would even further increase the cost of FELA to the nation's railroads because they permit recovery under FELA for purely emotional injury without any contemporaneous physical impact injury to the employee which precipitates the emotional stress.

AAR has another strong interest in this case as a result of the fact that railroads, because of their widespread operations, are subject to suit in a number of different venues, often in places that have little connection to the accident that gives rise to the suit.[3] The liberal venue provisions of FELA have made forum shopping commonplace.[4] Since *Buell* there have been a large number of decisions by lower federal courts on the issue of whether and under what circumstances emotional injuries are cognizable under FELA. The courts have reached widely varying results, from requiring that there be a physical impact as a condition for recovery, *see, e.g., Gaston v. Flowers Trans.*, 866 F.2d 816 (5th Cir. 1989), to, as the cases at bar held, permitting recovery for any injury that is foreseeable. When such a serious conflict exists among the circuits, railroads are particularly vulnerable as FELA plaintiffs have a greater ability to select favorable jurisdictions than do plaintiffs in other types of actions. Therefore, AAR has a strong interest that there not be a migration of marginal cases to the Third Circuit.

A further interest of AAR in these cases is the effect they will have on the heretofore well-established employer-employee administration of the Railway Labor Act (RLA). Under that act, work-related grievances, whether or not related to the interpretation or application of a collective bargaining agreement, are subject to mandatory mediation under the procedures therein set forth. 45 U.S.C. §151 *et seq.*, 45 U.S.C. §152. If the procedures of RLA are to be replaced by courts and juries in emotional distress cases such as the cases at bar, it will have a major adverse impact on the effectiveness of RLA and increase the burden on an already overloaded federal court system.

For the foregoing reasons AAR respectfully submits that the attached *amicus curiae* brief will not only aid this Court in the resolution of the questions raised by the opinions below, but may also help to bring this Court's attention to the importance and effect its decision will have on the entire railroad industry in the United States.

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[3] Railroads can be sued under FELA in state or federal court wherever the railroad is doing business. 45 U.S.C. §56.

[4] For instance, in its Petition for Writ of Certiorari filed with respect to *Burlington Northern R.R. Co. v. Ford*, 819 P.2d 169 (Montana 1991), *cert. granted*, 112 S.Ct. 964 (1992) (No. 91-779) (challenging Montana's liberal venue provisions), Burlington Northern Railroad Company documented that two counties in Montana with pro-plaintiff reputations had become magnets for FELA filings. During a six year period, over 85 percent of Montana FELA claims were filed in those two counties, even though none of those claims alleged an injury had occurred in the county of venue, and only 10 (out of 122) were brought by a resident of the county of venue. Burlington Petition at 16.

AAR therefore moves this Court for leave to file the attached brief.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

QUESTION PRESENTED

Does FELA provide a statutory cause of action for the negligent infliction of emotional distress in the absence of physical impact?

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INTEREST OF *AMICUS CURIAE*

The Association of American Railroads (AAR) is a voluntary, nonprofit, incorporated trade association. Its members constitute the vast majority of the nation's railroads, operating approximately 76 per cent of the total line-haul mileage, producing approximately 91 per cent of the freight revenues, and employing approximately 90 per cent of the railway work force in the United States, which numbers in total about 260,000 employees. AAR represents its members before courts, agencies and the Congress on matters of general concern to the railroad industry.

Working conditions for railroad employees today are safer than they have ever been before.[1] However, AAR members spend almost one billion dollars annually under the Federal Employers' Liability Act (FELA) to compensate employees who are hurt on the job. This amount has been increasing steadily in recent years despite a continued decline in injuries.[2] Thus, any judicial decisions which expand the scope of compensable injury under FELA to include work-related emotional stress is of material interest and concern to AAR.

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[1] According to the U.S. Dept. of Transp., Federal Railroad Administration, *Accident/Incident Bulletin,* 66,924 injuries were reported by railroad employees in 1979. By 1992 the number of reported injuries dropped to 17,755. Although the number of railroad employees also had decreased (from 487,534 to 235,834), as well as the number of manhours worked (from 1077 million to 517 million), these figures show that the injury rate per million manhours declined from 62.23 to 34.34. *See also* The Bureau of Labor Statistics, *Occupational Injuries and Illnesses in the United States* 2,18,75 (1991) rating railroad work safer, 7.6 injuries per 100 full-time workers (200,000 manhours), than the average for all industries (7.9), or than trucking (14.5), water transportation (11.6), or air transportation (14.0).

[2] In 1979, railroads paid $296,000,000 in FELA claims. Association of American Railroads, *1979 Claims and Litigation Report* (1980). In spite of steadily decreasing railway injuries (see footnote 1 *supra*), the amount paid in 1992 had increased to $963,000,000. *See 1992 Claims and Litigation Report* (1993).

The two decisions of the Third Circuit now before this Court, if allowed to stand, would even further increase the cost of FELA to the nation's railroads, because they permit recovery under FELA for purely emotional injury without any contemporaneous physical injury to the employee which precipitates the emotional stress.

This Court has never permitted recovery for pure emotional distress under FELA without contemporaneous physical impact. However, in 1987, in *Atchison T. & S. F. R. Co. v. Buell*, 480 U.S. 557 (1987), this Court held that the Railway Labor Act (RLA), 45 U.S.C.S. §§151-168 (1992) is not a railroad employee's exclusive remedy for claims of intentional harassment, threats or intimidation inflicted by supervisors or fellow employees, suggesting that, in a proper case, an employee could make his or her claim under FELA. However, this Court specifically declined to decide in *Buell* "whether purely emotional injuries are cognizable under FELA." *Id.* at 567. Rather, it stated that the question of whether one can recover for emotional injury under FELA may not be susceptible to an all-inclusive "yes" or "no" answer but that "as in other areas of law . . . broad pronouncements may have to bow to the precise application of developing legal principles to the particular facts at hand." *Id.* at 570.

As *amicus* in *Buell*, AAR expressed concern that if FELA was to become an alternative for employees with grievances arising out of working conditions, many of these claims would crowd the dockets of the federal courts. This Court discounted this concern, stating that

it was based on the misguided belief that all sorts of minor grievances would become FELA cases. *Id.* at 566-567 n.13. The Court disagreed that a significant percentage of employees bringing grievances under RLA suffer the type of "severe emotional injury that has generally been required to establish liability for purely emotional injury . . . and that a significant percentage of employees are subject to the type of unconscionable abuse which is a prerequisite to recovery." *Id.*

AAR's concern was based on the apprehension that an adverse decision in *Buell* would lead to lower court decisions like *Gottshall* and *Carlisle*. With employees now having the option of bypassing RLA, railroads are now confronted with FELA litigation where all that is required to state a claim is an employee with an allegedly work-induced anxiety, who does not like his boss or has some other complaint about conditions in the workplace, and a psychiatrist willing to testify that plaintiff was severely mentally distressed thereby.[3] Hence, the disposition of *Gottshall* and *Carlisle* by this Court is of continuing and growing interest to the railroads of the United States.

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[3] Unlike the Title VII legislation recently construed by this Court in *Harris v. Fork Lift Systems, Inc.*, 62 U.S.L.W. 4004 (U.S. Nov. 9, 1993), FELA was not intended to afford workers protection from workplace harassment or abuse. Instead, FELA was intended to provide railroad workers with a remedy for physical injuries resulting from employer negligence. Drawing a distinction between Title VII claimants and parties making tort claims, Mr. Justice Scalia noted in his concurrence in *Harris* that "[T]he class of plaintiffs seeking to recover for *negligence* is limited to those who have suffered harm." *Harris* at *5 (emphasis added). Under FELA, although a liberal definition of "negligence" is warranted through judicial interpretation of the statute, "harm" historically has been limited to the sorts of physical injuries that were relatively common in the railway industry. *See, e.g.*, *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985) (Posner, J) *cert. denied*, 480 U.S. 945 (1987) ("[T]he FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact." *Id.*)

AAR has another strong interest in this case as a result of the fact that railroads, because of their widespread operations, are subject to suit in a number of different venues, often in places that have little connection to the accident that gives rise to the suit.[4] The liberal venue provisions of FELA have made forum shopping commonplace.[5] Since *Buell* there have been a large number of decisions by lower federal courts on the issue of whether and under what circumstances emotional injuries are cognizable under FELA. The courts have reached widely varying results, from requiring that there be a physical impact as a condition for recovery, *see, e.g., Gaston v. Flowers Trans.*, 866 F.2d 816 (5th Cir. 1989), to, as the cases at bar held, permitting recovery for any injury that is foreseeable. When such a serious conflict exists among the circuits, railroads are particularly vulnerable as FELA plaintiffs have a greater ability to select favorable jurisdictions than do plaintiffs in other types of actions. Therefore, AAR has a strong interest that there not be a migration of marginal cases to the Third Circuit.

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[4] Railroads can be sued under FELA in state or federal court wherever the railroad is doing business. 45 U.S.C. §56.

[5] For instance, in its Petition for Writ of Certiorari filed with respect to *Burlington Northern R.R. Co. v. Ford*, 819 P.2d 169 (Montana 1991), *cert. granted*, 112 S.Ct. 964 (1992) (No. 91-779) (challenging Montana's liberal venue provisions), Burlington Northern Railroad Company documented that two counties in Montana with pro-plaintiff reputations had become magnets for FELA filings. During a six year period, over 85 percent of Montana FELA claims were filed in those two counties, even though none of those claims alleged an injury had occurred in the county of venue, and only 10 (out of 122) were brought by a resident of the county of venue. Burlington Petition at 16.

A further interest of AAR in this case is the effect it will have on the heretofore well-established employer-employee administration of RLA. Under that act, work-related grievances, whether or not related to the interpretation or application of a collective bargaining agreement, are subject to mandatory mediation under the procedures therein set forth. 45 U.S.C. §151 *et seq.*; 45 U.S.C. §152. Those proceedings mandate that the parties first seek resolution on the railroad's own property up to the Chief Operating Officer, then, if unresolved, to the National Railroad Adjustment Board, which is composed equally of representatives of both management and labor. 45 U.S.C. §153. Where the employee's physical ability to perform his work is at issue, the question is referred to a three doctor panel, one doctor selected by each party and the third selected by the first two. *Gunther v. San Diego & A.E.R. Co.*, 382 U.S. 257, 261-62 (1965).

If the procedures of RLA are to be replaced by courts and juries in emotional distress cases such as the cases at bar, it will have an adverse impact on the effectiveness of RLA and increase the burden on an already overloaded federal court system.

SUMMARY OF ARGUMENT

The negligent infliction of emotional distress is not the type of physical "injury" for which the FELA was designed by Congress as a remedy. That statute, as this Court has many times held, was enacted by Congress to compensate physically injured railroad workers for railroad negligence causing their injury. It should not have engrafted upon it claims of psychological injury alone because Congress did not and has not so provided and neither science nor the ordinary layman are capable of providing Congress, courts and juries with objective facts with which to determine if purely psychological injuries have occurred. The interests of justice suggest a test which requires actual measurable physical impact as a basis for recovery of damages for emotional stress.

ARGUMENT

I. The Opinions Below Expand FELA Coverage From Its Historic Congressional Purpose Of Protecting Physically Injured Railroad Workers To A Type of Claim That Congress Never Intended And This Court Has Never Heretofore Permitted.

The two opinions of the Third Circuit Court of Appeals before the Court, *Gottshall v. Consolidated R. Corp.*, 988 F.2d 355 (3d Cir. 1992) and *Carlisle v. Consolidated R. Corp.*, 990 F.2d 90 (3d Cir. 1993), involve a single issue. That issue is whether a railroad employee has a cause of action under FELA, in the absence of physical impact, to recover damages when the only alleged statutory "injury" is the result of the negligent infliction of emotional distress.

In *Gottshall*, the plaintiff witnessed a fellow employee, who was his friend, suffer a fatal heart attack while working on a very hot day. Plaintiff had to stay at the workplace while his friend's body lay nearby awaiting the coroner, and plaintiff began to fear that he too might have a coronary. Subsequently he became depressed and sought psychiatric care.

In *Carlisle*, the plaintiff was required to work as a dispatcher for long hours under allegedly stressful conditions. He too became depressed and sought psychiatric care. Carlisle recovered an FELA judgment of $386,500. In contrast, four of his fellow workers, exposed to the same workplace stresses, had their claims dismissed by another district court in the Third Circuit on the ground that "the type of conduct that has led to the evolution of the negligent infliction tort is simply not the type of conduct alleged in the case at bar." *Kraus v.*

Consolidated Rail Corp., 723 F. Supp. 1073 (E.D. Pa. 1989), *appeal dismissed on procedural grounds*, 899 F.2d 1360 (3d Cir. 1990).

In neither case did plaintiff suffer direct physical impact, nor was either exposed to any stress of present physical impact. In both cases plaintiffs, had they chosen, could have sought relief under RLA. However, the Third Circuit, admitting that it was breaking new ground, held that both plaintiffs were entitled to recover under FELA.

While *Buell* expressly declined to decide under what circumstances a purely emotional distress case could be made, *Buell* acknowledged that the Restatement of Torts, Second, recognizes the tort of intentional infliction of emotional distress, §46, but that the Restatement denies it for the negligent infliction thereof, §436A. This is also the view of W. Page Keeton, *et al.*, *Prosser and Keeton on Torts* §54 (5th ed. 1984).

In *Carlisle*, the Third Circuit quotes the frustrated author of a 1959 ALR annotation in these words:

> The case law in the field here treated is in an almost unparalleled state of confusion and any attempt at a consistent exegesis of the authorities is likely to break down in embarassed perplexity. Early attempts by the courts to deal with the questions were complicated by the lack of any adequate body of legal authorities as well as by the inadequacy of the factual or scientific information available.

W. E. Shipley, Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences in the Absence of Impact or Other Actionable Wrong.* 64 A.L.R. 2d 100, 103 (1959).

That confusion has continued.

Since *Buell*, district and circuit courts have reached such varying results in more than 80 published opinions, leaving both panels below to conclude that, "in the wake of *Buell* . . . there is no common discernable principle, test, view or attitude." *Gottshall* at 365; *see also Carlisle* at 95 (quoting *Gottshall*).

Some of the difficulty in establishing a consistent standard comes from the nature of FELA itself. This Court stated in *Urie v. Thompson*, 337 U.S. 163 (1949), and reiterated in *Buell*, that FELA jurisprudence "gleans guidance" from common law developments. *Buell* at 568. The legislative history of FELA makes clear that it was enacted and amended because of the dangerous physical hazards associated with working on the railroad. *See* Petitioner's Brief Section I (A)(2). There is no evidence in that history that Congress intended to do more than provide recovery for physical injuries. There is simply no Congressional intention shown to protect employees from emotional distress unaccompanied by physical impact.

The history of FELA shows that Congress, when it has found the need, has been clear in indicating its intended scope and substance. As originally enacted, FELA replaced the doctrine of contributory negligence with comparative negligence and also abolished the common law fellow servant rule. Act of March 22, 1908, Pub. L. No. 60-100, 35 Stat. 65. Two years later, Congress amended FELA to permit suits to be filed in either state or federal court wherever the railroad does business. Act of April 5, 1910, Pub. L. No. 61-117, §§1, 6, 36 Stat. 291. In 1939, the statute was amended to abolish the common law doctrine of assumption of risk. Act of August 11, 1939, Pub. L. No. 76-382, §2, 53 Stat. 1404.

At the same time, in its interpretation of FELA, this Court historically has striven to remain true to the intent indicated, declining to permit recovery under FELA when there was no evidence that Congress intended such a recovery to be available. Thus, in *Monessen Southwestern R. Co. v. Morgan,* 486 U.S. 330 (1988), this Court refused to permit the recovery of prejudgment interest in FELA cases. In that case, this Court searched for Congressional intent on the question of whether prejudgment interest was available. In finding that prejudgment interest was generally unavailable when FELA was enacted and construing congressional silence "in the appropriate historical context" as an intention not to alter the *status quo,* this Court said:

> We are unwilling in the face of such congressional inaction to alter the longstanding apportionment between carrier and worker of the costs of railroading injuries. If prejudgment interest is to be available under the FELA, then Congress must expressly so provide.

Id. at 339.

Monessen was not the first case in which this Court ruled that expanding the scope of FELA was a task for Congress, and not the judiciary. In *Crane v. Cedar Rapids & Iowa City Ry. Co.,* 395 U.S. 164 (1969), the Court declined on exactly those grounds to extend FELA remedies to a non-employee, even though the non-employee had been working with railroad equipment and the injury had been a result of a violation of federal safety laws.

In general, when construing federal statutes intended to grant particular classes of employees remedies for workplace injury, this Court has deferred to Congress when asked to expand the scope either of the protected class or the remedies available. *See, e.g., Miles v. Apex Marine Corp.,* 111 S.Ct. 317 (1990) (relying on congressional intent analysis to limit damages in wrongful death action under Jones Act); *Pennsylvania R.R. Co. v. O'Rourke,* 344 U.S. 334 (1953) (relying on congressional intent analysis to determine scope of Longshoremen's and Harbor Workers' Compensation Act).

The analysis applied in *Monessen* is appropriate in the present case. At the time FELA was enacted, claims for emotional injury in the absence of physical impact were not unknown at the common law.[6] However, as with prejudgment interest in personal injury cases, most states rejected these claims. *See generally* Keeton, §54. Although Congress specifically drafted FELA to liberalize other aspects of the common law, FELA is silent regarding emotional injuries. Further, while courts have held that there can be no recovery for emotional injury absent concurrent physical impact, Congress has remained silent on the issue, just as it had regarding availability of prejudgment interest.

This parallel analysis leads to a parallel conclusion: Engrafting a cause of action for emotional injury in the absence of physical impact upon FELA, which is a statute intended to protect railroad workers from injuries caused by physical impact, is a task that should be left to Congress.

Buell was decided in 1987. Two years later, in *Gaston v. Flowers Transportation,* 866 F.2d 816 (5th Cir. 1989), a Jones Act case applying FELA, the Fifth Circuit could say that an FELA case involving injury unaccompanied by impact was a case of first impression before it. Today, however, six years after *Buell,* almost every Circuit has considered the issue with varying results. There are now more than eighty written opinions by Federal Courts on this precise subject, including over twenty by the Court of Appeals. An uncounted number of claims have been settled, as the majority of FELA claims are settled, without trial.[7]

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[6] *See, e.g., Purcell v. St. Paul City Ry.,* 50 N.W. 1034 (Minn. 1892).

Clear judicial reasons for rejecting recovery under FELA for emotional distress unaccompanied by physical impact were given in *Gaston:*

> For the consequences of creating a compensable bystander's cause of action under these federal worker's compensation acts for seamen and railroaders would be random and wayward ones, multiplying damages incalculably on the basis of factors which are entirely incidental to the operation of the train or vessel and which bear little or no relationship to the safety of that venture—factors such as how many crew members happen to be standing around to observe an incident, whether their vision is obscured by darkness or weather, how close they are to the occurrence, and the like. Because they are irrelevant to that operation, visiting exponential damages on an employer on a basis of such factors is not only random and wayward, but serves in no way to advance the major subsidiary purposes of affording such remedies as those of the FELA/Jones Act to trainmen and seamen: to hold out incentives to their employers to reduce dangers and to operate safely. More, extending such potentially ruinous liability to employers involves evaluating economic tradeoffs which we (or any other court) are poorly equipped even to envision, let alone to weigh against each other.

Id. at 820.

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[7] *See, e.g., Visconti v. Consolidated Rail Corp.*, 801 F. Supp. 1200 (S.D. N.Y. 1990), in which plaintiff alleged 34 "incidents of harassment" as grounds for her FELA claims. The court rejected plaintiff's claims, stating: "Workplace disputes over hours, shifts and wages properly are resolved through the grievance procedures set forth in collective bargaining agreements and the mandatory statutory mechanisms. Disgruntled employees cannot transform such disputes into tort actions simply because they are dissatisfied with the results of the appropriate procedures." *Id.* at 1211.

II. The Present Uncertainty And Unreliability Of Psychiatric Testimony Regarding Emotional Trauma Supports Adoption Of A Bright Line Rule Requiring Physical Impact As A Prerequisite For A FELA Cause Of Action.

A claim of purely emotional injury is inherently difficult to disprove in a court of law. No objective evidence can be presented as indicia of psychic pain; therefore, proof of emotional injury must usually be offered through the medium of experts trained to discern its existence.

Practitioners in the field, as well as other learned professionals, acknowledge that psychiatric diagnoses lack the precision and objectivity of other scientific fields. As one scholar put it,

> We like to see ourselves as scientists, but our literature, until recent years, has been largely speculative and philosophical. Primarily we are doctors of medicine, but more often than our colleagues in other fields of medicine, we deal with the subjective reports of our patients and with their behaviorial manifestations which often are complicated by issues of morality and legality.

James L. Mathis, *Psychiatric Diagnoses: A Continuing Controversy,* 17 Jour. of Med. & Phil. 253, 259 (1992). Another was more succinct: "Stated bluntly, in terms of requirements of the natural science model, psychiatric diagnosis is usually quite unreliable." Thomas J. Scheff, *Accountability in Psychiatric Diagnosis: A Proposal,* in *Contemporary Directions in Psychopathology: Toward the DSM-IV* 265, 274 (Theodor Millon & Gerald L.

Klerman, eds. 1986) (noting statistical studies indicating level of disagreement in diagnoses).[8]

Nowhere is this unreliability potentially more endemic than in the field of psychic trauma diagnosis and treatment. Mental health care professionals are still in the process of defining the forms that such trauma may take, and the stimuli from which it may arise.[9] In its present state, "[r]esearch on common stressful life events has been criticized as tautological: Stressors are events which produce a stress response; stressors are negative because they are associated with unwanted consequences. Traumatic stress research, as a study of extreme stress, is subject to the same criticism: An event is a trauma because its consequences are traumatic." Solomon & Maser at 1625 (citations omitted).

Issues of causation in psychic trauma research are equally unsettled; researchers still remain unable to predict with any specificity what sorts of events are liable to induce trauma, or the sorts of disorders that are

likely to ensue. *See, e.g.*, Scott M. Monroe & Sheri L. Johnson, *The Dimensions of Life Stress and the Specificity of Disorder,* 20 J. of Applied Soc. Psych. 1678 (1990) ("One major challenge to a full understanding of stress-disorder relationships pertains to the lack of knowledge surrounding the choice of disease: What determines the type of the disorder that ensues after stress?" *Id.*)

While the psychiatric profession may be able to afford the luxury of such imprecision, the legal profession cannot. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), this Court acknowledged and approved the premise that, in order to warrant the label, purportedly scientific techniques must meet certain standards of testability and falsifiability. *Id.* at 2796-97 (citing Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989)).

In this climate, a claim of purely psychological injury threatens to impose virtually strict liability upon anyone upon whom it is made. Practitioners who testify in court are urged to seek a potentially traumatic event in a patient's past when faced with symptoms as amorphous as apathy, weight loss, depression, substance abuse, impulsive behavior, headaches or deterioration in work performance. *See* Charles R. Figley, C.B. Scrignar & William H. Smith, *The Aftershocks of Trauma,* 26 Patient Care 121 (March 30, 1992). Events such as routine disciplinary actions are styled "traumatic" by diagnosticians. *See* Diane Sullivan Everstine & Louis Everstine, *The Trauma of Response: Treatment of Emotional Injury* 176-77 (1993) (text even includes a chapter on litigation preparation).[10] At the very least, such vagueness is guaranteed to spawn an utterly nonsensical jurisprudence of liability.

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[8] This self-assessment by members of the profession and other scholars is inconsistent with the credulity some legal scholars and state courts have shown regarding psychiatric testimony; *see, e.g.*, Douglas Bryan Marlowe, Comment, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress,* 33 Vill. L. Rev. 781 (1988) (citing *Rodrigues v. State,* 472 P.2d 509 (Haw. 1970); *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980)).

[9] Although recognized in the form of "shell-shock" since around World War I, truly systematic study of traumatic stress did not begin until 1980, when "posttraumatic stress disorder" was first recognized as a diagnostic category by the American Psychiatric Association. Susan M. Solomon & Jack D. Maser, *Defining Terms and Instruments for Assessing Traumatic Stress,* 20 J. of Applied Soc. Psych. 1623, 1624 (1990) (citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1980)).

FELA should not become a ground upon which litigants attempt to prove injuries that science cannot define.

Would it not be better for the impartial and evenhanded administration of justice that a bright line rule be established which denies recovery under FELA for alleged injuries caused by emotional distress unless there has been concomitant physical injury? A respectable number of courts below are continuing to so hold. *See* Petitioner's Brief, Section II (B).

In a very recent case the Fifth Circuit has recognized the necessity for such an objective rule requiring physical impact or injury in order to recover for emotional trauma. In *Gough v. Natural Gas Pipeline Co. of America*, 996 F.2d 763, 765 (5th Cir. 1993), the court stated that an important purpose of the physical impact rule is "to provide courts with an objective means of ensuring that the alleged mental injury is not feigned." *Id.*, citing *Hagerty v. L. & L. Marine Services, Inc.*, 788

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[10] Definitions of trauma and other psychological maladies are also politically malleable. *See, e.g.*, Nada L. Stoland, *The Myth of the Abortion Trauma Syndrome*, 268 JAMA 2078, 2079 (Oct. 21, 1992), in which the author notes that the only scholarship supporting the existence of such a syndrome has been based on anecdotal evidence, and has appeared in religious and "nonspecialty" literature, and yet the term has taken its place in popular discourse. Another observer has noted that "third party intervention," in the form of government and private entities, such as insurers, has a significant impact on diagnostic categories and forms of recommended treatment. Mathis at 258-59.

F.2d 315, 318 (5th Cir. 1986).[11] Since the psychiatric community appears incapable of providing courts with anything even approaching objective criteria, such a bright-line rule is necessary.

In its earlier first decision adopting this rule (in which the court rejected a claim which factually was very similar to that of *Gottshall*), the court of appeals in *Gaston* reflected:

> Given the present state of psychiatric knowledge, how common is the incidence of actual, emotional injury derived from witnessing a single occasion on which another is killed or injured? Who, if anyone, knows?

Gaston at 820 n.3,[12]

Since neither science nor the experiences of the ordinary lay person are capable of providing courts with objective facts from which to determine the existence of purely psychological injuries, the interests of justice require adoption of a bright line test. The test most consistent with the language and purpose of FELA, which was intended to compensate railway workers for physical injuries, is the physical impact test. This is especially the case where, as here, plaintiffs suffering emotional distress at the workplace are not without other remedies.

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[11] *Gough*, a case involving maritime injury, cites in support of its propositions more than one Jones Act case in which a physical impact standard was adopted. *See, e.g., Hagerty; Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir. 1989). Since the Jones Act incorporates FELA, Jones Act cases and their progeny are highly relevant to the issue at hand.

[12] In *Gaston*, a case arising under the Jones Act, the plaintiff saw his half-brother crushed between a barge and the tug pushing it, but suffered no injury himself (other than a bruised elbow). Plaintiff claimed that he suffered from post-traumatic stress disorder, and sought damages under a bystander theory of liability.

III. The Railway Labor Act And Other Labor Statutes And Labor Agreements Provide An Adequate And Well-Established Remedy For Employee Workplace Grievances In Cases Which FELA Does Not Reach.

Adopting a physical impact test will not leave railroad workers who suffer from job-related stress without recourse or remedies for their situation.

For over a century, railroad workers have been well-organized to protect their rights. Work rules governing the conditions of the workplace and the nature of the work each employee is required to perform are pervasive in the industry. Carefully crafted labor agreements set up elaborate procedures for the processing and remedying of workplace grievances. Also, under these agreements, railway workers are entitled to health care and disability benefits that provide for the treatment not only of physical ailments, but also alcohol and chemical dependency as well as psychological and nervous disorders. *See, e.g.*, Travelers Insurance Company, GI-55826, *The Health and Welfare Plan of the Nation's Railroads and the Railway Labor Organizations* 10-14 (1984) (summarizing employee health benefits); *id.* at 60-61 (discussing terms specific to psychological disorders and $2,000 cap on yearly out-of-pocket expenses); U.S. Railroad Retirement Board, UB-5, *Unemployment and Sickness Benefits for Railroad Workers* 4-11 (1978) (summarizing sickness benefits).

RLA is specifically designed to enforce these agreements in favor of a railroad worker who has a grievance of any kind against his employer. RLA embraces:

> all disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working condition. . . .

45 U.S.C. §151(a)(5).

Thus grievances subject to RLA resolution involve not only the interpretation of labor agreements affecting more than one employee but interpretation, for individual employees, of operating rules, hours of service, time off and redress for the very working conditions for which plaintiffs Gottshall and Carlisle sought relief under the FELA. If the grievance cannot be settled on the railroad property, it is sent to the National Railroad Adjustment Board (Adjustment Board), composed equally of representatives of management and labor.

As this court has said, the Adjustment Board:

> is peculiarly familiar with the thorny problems and the whole range of grievances, that constantly exist in the railroad world. Its membership is in daily contact with workers and employees, and knows the industry's language, customs and practice.

Gunther at 261.

Thus, the adoption of the physical impact test urged here will not leave workers without remedy. Emotional stress cases may not withstand the rigors of the court system. However, the Adjustment Board consists of labor and management representatives who are familiar with not only the rights of employees under their labor contracts but also the established history, customs and practices of the industry, the "common law of the shop." In fact, RLA may provide a more meaningful remedy for redressing stressful working conditions. Whereas FELA simply awards monetary damages to an individual employee, which may or may not have an impact on the workplace, RLA is designed to address directly the working environment.

CONCLUSION

Nothing in the Congressional history of FELA warrants engrafting upon the cause of action therein created a cause of action for injuries resulting from psychological trauma unaccompanied by physical impact. FELA was enacted by Congress and has been enforced to compensate workers for workplace physical injuries. A bright line test requiring actual physical impact before there can be recovery of damages under FELA for psychological injury accords both with the general interests of justice and the specific purpose of FELA.

Accordingly, *amicus curiae*, Association of American Railroads, respectfully submit that the cases before it on this petition should be reversed and final judgment entered for petitioner Consolidated Rail Corporation.

Respectfully submitted,

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No. 92-1956

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CONSOLIDATED RAIL CORPORATION,
Petitioner.
v.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER AND PROPOSED BRIEF

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MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Product Liability Advisory Council, Inc., ("PLAC") respectfully moves, pursuant to Supreme Court Rule 37.4, for leave to file a brief as *amicus curiae* urging that this Court reverse the judgments of the United States Court of Appeals for the Third Circuit. Although counsel for petitioner has consented to the filing of the proposed brief, counsel for respondents have refused.

PLAC is a nonprofit corporation with 106 corporate members from a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to pharmaceutical products. In addition, PLAC has numerous sustaining members, who are leading product liability defense lawyers from across the nation. PLAC's purpose is to file *amicus curiae* briefs on behalf of its members on issues that affect the law of product liability. PLAC has submitted many such briefs in state and federal courts, including this Court.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell,* 480 U.S. 557, 568 (1987), this Court observed that Federal Employers' Liability Act ("FELA") jurisprudence "gleans guidance from common-law developments." PLAC believes that the Third Circuit departed from that path. It rejected as "harsh and arbitrary" every common law standard governing claims for negligent infliction of emotional distress, *Gottshall* v. *Consolidated Rail Corp.,* 988 F.2d 355, 366 (3d Cir. 1993), in favor of "an ad hoc approach that focuses more on the facts rather than rules of law." *Id.* at 365. In so doing, the court spurned any guidance from the common law experience with claims for emotional distress. The court's unprecedented approach fails to address the concerns articulated in the common law, and applicable as well to FELA.

The fundamental theme of the common law of negligent infliction of emotional distress is that emotional distress claims are different from other tort causes of action. Although common law courts have developed a variety of standards for emotional distress claims, each standard addresses the same basic questions—how liability can be reasonably contained, how the courts can distinguish between genuine and frivolous claims, and how the law can develop rules that are easily and consistently applied. PLAC submits that the approach adopted by the Third Circuit does not deal adequately with any of these issues, to the detriment of the policies underlying FELA and the safety of the workplace.

The impact of this Court's decision, although rendered in the context of a particular federal statutory scheme, will undoubtedly extend beyond its confined circumstances. Just as FELA jurisprudence "gleans guidance" from the experience of the common law, so does the common law find instruction in this Court's pronouncements and concerns. PLAC fears that affirmance of the Third Circuit's opinions will undermine the development of the common law precisely because those opinions ignore the lessons learned through years of confronting these difficult issues. The members of PLAC, therefore, have a vital interest in urging not only that this Court reject the Third Circuit's ill-defined "ad hoc" approach to claims of negligent infliction of emotional distress, but also that it adopt a standard which acknowledges the concerns of the common law and helps bring coherence to this area of jurisprudence.

As an organization focused on tort law, PLAC offers unique expertise on common law developments with respect to emotional distress claims. Corporate members of PLAC have been party to, and sustaining members have served as counsel in, numerous civil cases involving claims of emotional distress. The participation of PLAC is particularly important not only because of the expertise it brings to this case, but also because petitioner and other *amici* do not focus on the common law in detail nor on the implications of this case beyond FELA.

For these reasons, counsel request that the Court authorize PLAC to file the annexed brief as *amicus curiae.*

Respectfully submitted,

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit corporation with 106 corporate members from a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to pharmaceutical products. PLAC's purpose is to file *amicus* briefs on behalf of its members on issues that affect the law of product liability. PLAC has submitted many *amicus* briefs in state and federal courts, including this Court.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell,* 480 U.S. 557, 568 (1987), this Court observed that

"FELA jurisprudence gleans guidance from common-law developments." As an organization focused on tort law, PLAC offers unique expertise on those common law developments with respect to emotional distress claims. Moreover, corporate members of PLAC have been party to numerous civil cases involving claims of emotional distress. Because common law courts may glean guidance from the pronouncements of this Court on the standards for emotional distress claims under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, PLAC has a significant interest in this case.

SUMMARY OF ARGUMENT

The court of appeals failed to follow this Court's charge in *Buell*, 480 U.S. at 568, to glean "guidance from common-law developments" in fashioning standards under FELA. Rather, it rejected all common law standards for emotional distress cases. Indeed, in *Gottshall* v. *Consolidated Rail Corp.*, 988 F.2d 355 (3d Cir. 1993), the court "refused to designate a particular common law test as *the* test in this circuit, choosing instead to take an ad hoc approach." *Id.* at 365 (emphasis in original). This nebulous "I know it when I see it" approach, *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), failed to address the concerns articulated in the common law, applicable to FELA, regarding negligent infliction of emotional distress.

The fundamental theme of the common law in this area is that emotional distress claims are different from other tort causes of action. They are intangible. They are subjective. They are difficult to disprove. And they pose the risk of endless liability. Consequently, common law courts have developed a variety of standards addressing basic questions: How can liability be confined within reasonable bounds? How can the courts distinguish between genuine and frivolous claims? How can the law develop rules that are easily and consistently applied?

The Third Circuit's standardless approach resolves none of these issues.

A better approach, one consistent with policies of the common law and of FELA, would allow emotional distress claims only by persons who suffer physical impact or who are threatened with injury by the defendant's conduct, that is, those in the "zone of danger" resulting from the defendant's actions. This threshold standard winnows out trivial claims of bruised feelings or emotional upset, while allowing recovery for those persons most likely affected by a defendant's negligence. It provides an assurance of the genuineness of emotional distress claims. And it is easily administered, coinciding with the traditional focus of tort law on personal safety.

The zone of danger standard, however, is merely a threshold test. The plaintiff still must prove his or her case. This Court should provide guidelines regarding the proof required. Among the factors the court and jury should consider are whether the plaintiff's alleged emotional distress was manifested in physical symptoms and whether it was a reasonable reaction to the defendant's conduct.

This two-tiered approach distills the lessons of the common law and applies them appropriately in the context of FELA.

ARGUMENT

I. THE COURT BELOW SPURNED ANY GUIDANCE FROM THE COMMON LAW.

The court of appeals disregarded this Court's prescription in *Buell* to draw lessons from the common law. To be sure, the court dutifully surveyed common law developments. However, it then rejected all the common law standards as "harsh and arbitrary," *Gottshall,* 988 F.2d at 366, in favor of no standard at all. In the court's view, the common law had to "bow," because only an "ad hoc" approach was consistent with the policies of FELA. *Id.* at 365, 371. *See also Carlisle* v. *Consolidated Rail Corp.,* 990 F.2d 90, 98 (3d Cir. 1993) (engaging in "initial review of the factual indicia of the genuineness of a claim" without identifying such indicia).

Granted, the Court was not required to poll the lower courts to determine the most popular of the common law tests. However, it accepted none of them, declaring the common law experience inapplicable and embarking on a course that no prior decision had taken.

There is, in fact, vast experience at common law with emotional distress claims. A computer search revealed approximately 7,000 *reported* state and federal cases discussing emotional distress claims in just the last 10 years. The number of unreported cases is undoubtedly much higher.

Common law courts have struggled with disparate standards for emotional distress cases. Indeed, in *Buell,* this Court noted the "doctrinal divergences" in common law decisions involving emotional distress. 480 U.S. at 570. The divergences, however, are useful in formulating an approach under FELA. Every standard has been examined and re-examined, criticized and defended, explicated and amplified. The profusion of litigation on these issues provides a rich vein of ore from which to mine the policies that have shaped the common law.

Having undertaken that exercise, the Court can then determine how those policies apply under FELA, and what standards flow from them.

II. COMMON LAW COURTS HAVE RECOGNIZED THE NEED TO LIMIT LIABILITY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

One fundamental precept emerges from the common law of negligent infliction of emotional distress—that emotional distress claims are different from other tort causes of action.[1] They are, unlike most claims of physical injury, ethereal, manipulable, and inextricably intertwined with the normal emotional incidents of everyday life. Those differences have affected the standards of liability at common law.

A. Courts Have Been Concerned That Liability For Emotional Distress Can Extend Without Limit.

Courts have treated emotional distress cases as unique because such claims have the potential of creating liability that is virtually limitless, in terms of both the scope of the claims and the number of potential plaintiffs. The courts have therefore imposed a minimum threshold for compensable emotional injuries, and created outer boundaries of liability delineating who is entitled to recover.

1. *Courts Have Fashioned a Minimum Threshold to Exclude Trivial Claims of Emotional Distress.*

Common law courts have made clear that tort law, unlike a railroad, is not a common carrier. Not every injury gets a ride. The law does not, and cannot, afford a remedy for every passing upset, fright, or instance of hurt feelings. In daily affairs, feelings are assaulted constantly by the careless or callous remark, the undeserved reprimand, the social slight. Most of the resulting emotional disturbances, though caused by the negligence of another, are "so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for [them] would unduly burden the courts and the defendants." *Restatement (Second) of Torts* § 436A cmt. b (1965).[2] Emotional distress, unlike physical injury, is simply part of daily life.

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[1] This case does not involve a claim of intentional infliction of emotional distress, and the standards governing such a claim are not in issue.

To suggest, then, as the Third Circuit did, that the key issue is "whether there was injury in fact reasonably attributable to the negligent conduct," *Gottshall*, 988 F.2d at 370, does not merely open the floodgates of litigation.[3] It interjects litigation as a looming force in social discourse. As Judge Magruder stated almost 60 years ago in assessing a proposal that any mental distress be actionable if purposely caused, "[a]doption of the suggested principle would open up a wide vista of litigation in the field of bad manners, where relatively minor annoyances had better be dealt with by instruments of social control other than the law." Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev.

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[2] *Accord Champion* v. *Gray*, 478 So. 2d 17, 18 (Fla. 1985) ("[t]here must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society") (quotations omitted); *Bass* v. *Nooney Co.*, 646 S.W.2d 765, 773 (Mo. 1983) (en banc) ("it is unreasonable to require that people act so carefully as to avoid occasionally angering or upsetting others, just as it is unreasonable to demand that one never accidentally jostle another in a crowd") (quotations omitted); *D'Ambra* v. *United States*, 114 R.I. 643, 653, 338 A.2d 524, 529 (1975) ("[c]ertainly the law should not compensate for every minor psychic shock incurred in the course of daily living; it should not reinforce the neurotic patterns of our society") (footnote omitted); *see also* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 54, at 360-61 (5th ed. 1984) (hereinafter "*Prosser*").

[3] Elsewhere in its opinion, the court of appeals acknowledged the policy that "frivolous claims for trivial emotional disturbances and bruised feelings that are ordinary and expected as a part of daily life . . . are not cognizable." *Gottshall*, 988 F.2d at 380. However, the means the court prescribes for enforcing that policy—the traditional tort concepts of duty, foreseeability and causation—in no way filter out trivial claims.

1033, 1035 (1936).[4] This wide vista of litigation for intentional torts is potentially even more far-reaching for negligently inflicted emotional distress.

2. *Courts Have Set Outer Boundaries on Liability for Emotional Distress.*

The second judicial concern, regarding who may recover for emotional distress, has also shaped the law in this area. Because every individual is bound to many others in familial, social and occupational relationships, the emotional consequences of any act of negligence extend much farther than the physical consequences. Although the traditional foreseeability standard, extolled by the Third Circuit, "may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm." *Thing* v. *La Chusa*, 48 Cal. 3d 644, 663, 771 P.2d 814, 826 (1989). Indeed, rejecting such an open-ended standard, the California Supreme Court remarked that "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Id.* at 668, 771 P.2d at 830.[5]

In this case, for example, if petitioner negligently caused the death of Gottshall's colleague Johns, it was arguably foreseeable that not merely Gottshall, but every other employee nearby would be distressed, perhaps seriously.

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[4] *Accord Ruth* v. *Fletcher*, 237 Va. 366, 372, 377 S.E.2d 412, 415 (1989) ("[i]f everyone was allowed damages for injuries to his feelings caused by someone else, the chief business of mankind might be fighting each other in the courts").

[5] *See Asaro* v. *Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595, 598 (Mo. 1990) (en banc) ("foreseeability goes 'forward to eternity, and back to the beginning of the world' ") (quoting William L. Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 24 (1953)); *Tobin* v. *Grossman*, 24 N.Y.2d 609, 616, 249 N.E.2d 419, 422 (1969) ("[i]f foreseeability be the sole test, then . . . [recovery] would extend to older children, fathers, grandparents, relatives, or others *in loco parentis*, and even to sensitive caretakers, or even any other affected bystanders").

In addition, one could expect that all the friends and family of Johns who were not present would be subject to emotional distress. And if it was foreseeable that Gottshall would be distressed to the degree he was, then it was equally predictable that his family and friends would experience mental anguish over his suffering. The rippling effects of this injury are nearly infinite, cabined not at all by the ostensible limit of foreseeability.

In theory then, for a single act of simple negligence that causes no physical harm, a defendant could be liable for psychiatric counseling, other medical expenses, lost wages, and damages for the pure emotional distress of concentric communities of affected parties. But the issue is not just whether lawsuits will proliferate, although that prospect is serious in an era of crowded dockets and scarce judicial resources.[6] The broader concern is that without particularized rules for emotional distress claims, liability will extend too far, impose too great a burden, and be too disproportionate to the defendant's fault in a negligence case.[7]

In sum, the common law courts have striven to fashion rules unique to emotional distress claims because the traditional totems of tort jurisprudence—duty, causation and foreseeability—did not confine liability for emotional distress within practical limits. That lesson of the common law applies as well to FELA.

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[6] For example, in California, following expansion of the workers' compensation rule concerning compensation for workplace stress, the number of such claims increased approximately sixfold in six years, and may be 70,000 per year. Arthur Larson, *The Law of Workmen's Compensation* § 42.25(a), at 7-958 (1992).

[7] *See Prosser* § 54, at 366 (it would be "an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends"); *cf. Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (psychological effects on relatives of persons affected by govern-

B. Courts Have Imposed Concrete Tests To Establish The Genuineness Of Emotional Distress Claims.

The common law also has recognized that the need to assure the genuineness of emotional distress claims requires objective limits on when such claims may be brought. This need is not, as the Third Circuit mistakenly implied, *Gottshall*, 988 F.2d at 370, the only justification for limitations on emotional distress claims, although it is an important one. Nor have considerations of authenticity centered only on the ability of courts to determine "whether there was injury in fact reasonably attributable to the negligent conduct." *Id.* The finder of fact must assess not merely the existence of mental distress, but its severity and duration as well. Each of these factors is intangible, and each is subjective. Compared to physical injuries, each is harder for doctors, and juries, to identify and measure. As even the court of appeals below recognized, "[o]ne can see frayed skin, but one cannot see frayed nerves; hence, an emotional injury is easier to fake." *Id.* at 361.

The source of concern, however, is not exclusively fakers and frauds. In the words of the Supreme Judicial Court of Massachusetts:

> A plaintiff may be genuinely, though wrongly, convinced that a defendant's negligence has caused her to suffer emotional distress. . . . It is in recognition of the tricks that the human mind can play upon itself, as much as of the deception that people are capable of perpetrating upon one another, that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered emotional distress.

Payton v. *Abbott Labs*, 386 Mass. 540, 547, 437 N.E.2d 171, 175 (1982). For example, some persons have a

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ment action too remote to include in environmental impact statement).

psychological need to blame external factors for their feelings of anxiety or depression.[8] A person's subjective belief that he or she has been psychologically harmed thus does not establish the existence of compensable emotional distress, much less its severity, duration, or relation to the alleged negligence. In other words, in a process requiring no objective corroboration of any claimed mental disturbance, the hypochondriac prevails. He is injured to the extent he thinks he is.

The inquiry on each of these issues is further complicated because the process of litigation itself may exacerbate an emotional disturbance or impede recovery. *See Stoleson* v. *United States,* 708 F.2d 1217, 1222 (7th Cir. 1983) ("awarding damages for hypochondria too freely might aggravate those symptoms and thus make litigation itself a source of illness"); Gary B. Melton et al., *Psychological Evaluations for the Courts* 283 (1987); Singer, 1 Am. J. Forensic Psych. at 10.[9] In cases involving fear of disease, for example—an increasingly common form of emotional distress litigation—counsel representing the plaintiff often needs to portray the feared event in the most dire terms and to overstate, or at least to emphasize, the likelihood of its occurrence. Such rhetoric can engender or amplify the very fears at issue in the suit.

The Third Circuit dismisses concerns about genuineness by counselling "active scrutiny of the facts," *Gottshall,* 988 F.2d at 371, and breezily predicts that "the court and the jury, drawing upon their combined human experiences in the course of a trial, will distinguish between victims and fakes." *Id.* at 373. But, as noted, the tripartite inquiry regarding the existence, severity, and duration of emotional distress is not so simple. Indeed, in contrast with the complacency below, many courts have questioned their own ability to authenticate or to calibrate the mental distress allegedly attributable to defendants' conduct.[10]

The assertion that progress in medical science vitiates judicial concerns about genuineness is rebutted by the prevalence of those misgivings to this day. Moreover, medical progress in fact has not simplified this inquiry. As this Court noted in a recent term, "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Medina* v. *California,* 112 S. Ct. 2572, 2580 (1992) (quotations omitted). Even psychiatrists do not believe they are as capable as the court below thinks it is in weeding out meritless claims of emotional distress. There are several reasons for their hesitancy. First, psychiatric diagnoses in this area are often difficult and unreliable.[11] Moreover, factors external to medical practice often enter the evaluation. For example, there is a high correlation between the diagnostic and prognostic decisions of mental health experts and whether they work for plaintiffs or defendants.[12] Whatever the explanation for this correlation, it underscores the need for objective factors to confirm the genuineness of emotional distress claims.

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[8] Barton A. Singer, *Psychological and Forensic Considerations in the Treatment of Post-Traumatic Stress Disorder,* 1 Am. J. Forensic Psych. 3, 5-6 (1983); *see* Douglas B. Marlowe, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress,* 33 Vill. L. Rev. 781, 818 (1988).

[9] Additionally, psychiatry recognizes that the propsect of litigation provides incentives to feign, imagine, or exaggerate a mental disturbance. The DSM-III-R, the basic text of psychiatric diagnosis, specifically notes that one of the circumstances creating a strong suspicion of such malingering is the "medicolegal context of presentation," that is, the pendency of a lawsuit. American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* § V65.20 (3d ed. rev. 1987).

[10] *E.g., Meracle* v. *Children's Service Soc'y,* 149 Wis. 2d 19, 28-29, 437 N.W.2d 532, 535-36 (1989); *Keck* v. *Jackson,* 122 Ariz. 114, 115, 593 P.2d 668, 669 (1979). Even this Court, in assessing the need to consider psychological effects in environmental impact statements, worried that, "[i]t would be extraordinarily difficult for agencies to differentiate between 'genuine' claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted policy." *Metropolitan Edison Co.* v. *People Against Nuclear Energy,* 460 U.S. 766, 778 (1983).

[11] *See Medina,* 112 S. Ct. at 2580 ("[p]sychiatric diagnosis . . . is to a large extent based on medical 'impressions' drawn from

That courts deal frequently with intangible claims for pain and suffering attendant to physical injury also is not a persuasive reason for greater latitude regarding emotional distress claims. First, with respect to pain and suffering, there is at least a physical injury providing objective verification of the genuineness of the claim. Furthermore, litigation involving pain and suffering is no model of juridical success. Approximately 23 states

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subjective analysis and filtered through the experience of the diagnostician") (quotation omitted); Stephen T. Perconte & Anthony J. Goreczny, *Failure to Detect Fabricated Posttraumatic Stress Disorder with the Use of the MMPI in a Clinical Population*, 147 Am. J. Psych. 1057, 1059-60 (1990) (failure of standard psychometric test); Landy Sparr & Loren D. Pankratz, *Factitious Posttraumatic Stress Disorder*, 140 Am. J. Psych. 1016, 1016 (1983) (reporting case studies and noting that the symptoms of post-traumatic stress disorders "are mostly subjective" and "can be easily simulated"); Nathan T. Sidley, *Proximate Cause and Traumatic Neurosis*, 11 Bull. Am. Acad. Psych. Law 197, 198 (1983) ("[i]n psychiatry and the field of causation of neurosis, the state of science is primitive; in the field of traumatic neurosis, it probably will always be primitive because of some basic difficulties"); American Psychiatric Association, *Quick Reference to the Diagnostic Criteria From DSM-III-R* 113-18, 146-48, 194-95 (1987) (psychiatric diagnoses require significant interpretation and subjective weighing of multiple simultaneous criteria).

[12] Jesse Simon & Jack Zusman, *The Effect of Contextual Factors on Psychiatrists' Perception of Illness: A Case Study*, 24 J. Health & Soc. Behav. 186 (1983); *see Stoleson* v. *United States*, 708 F.2d 1217, 1222 (7th Cir. 1983) (advising healthy skepticism toward emotional distress claims because "there is not much difficulty in finding a medical expert witness to testify to virtually any theory of medical causation short of the fantastic").

have enacted ceilings on damages for pain and suffering, reflecting significant dissatisfaction with the amount and unpredictability of such awards. *See* Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. Davis L. Rev. 499, 543 (1989).[13]

That so many courts have been so concerned for so long about genuineness in emotional distress cases is strong evidence that such claims are indeed different, that the factual inquiry they require is extraordinarily difficult. This Court should take heed of the longstanding and oft-stated warnings about the need for safeguards against unfounded claims of emotional distress.

C. Common Law Courts Have Adopted Bright-Line Rules To Gauge The Validity Of Emotional Distress Claims.

As noted, the Third Circuit "refused to designate a particular common law test as *the* test in this circuit, choosing instead to take an ad hoc approach." *Gottshall*, 988 F.2d at 365 (emphasis in original). With all due respect, this approach abdicates judicial responsibility. Absent some test of the validity of emotional distress claims that is more informative than the court of appeals' "gestalt," injured parties, tortfeasors, insurers, and their counsel have no way short of litigation to determine in any case whether there is a compensable claim for emotional distress. *See Thing*, 48 Cal. 3d at 655, 771 P.2d at 821 (criticizing prior California decisions because litigants "had no means short of suit" to determine whether a claim was actionable). "I know it when I see it" is no better standard for torts than for obscenity. *See Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

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[13] That a number of state courts have declared these damage caps unconstitutional in no way undermines the point that commentators, legislatures and courts have perceived a need for reform in this area.

As discussed above, *see* pp. 5-8, *supra*, virtually every court addressing claims for emotional distress has recognized that some limitation is essential. Otherwise, every trivial emotional slight could be litigable. Every person who learned of an injury to a friend would be a potential plaintiff. If not every instance of emotional upset or hurt feelings occasioned by the negligence of another is compensable, then some standard must identify which claims are cognizable and which are not. So long as a rule is necessary, the "societal benefits of certainty in the law, as well as traditional concepts of tort law," *Thing*, 48 Cal. 3d at 655, 771 P.2d at 815, dictate that it be clear and verifiable. *See Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1914-15 (1992) (bright line rules are particularly important when the law in the area "is something of a quagmire") (quotation omitted).

To illustrate, some courts have adopted only the vague threshold standard that emotional distress be "serious" or "severe" in order to ground liability.[14] But as one court has observed:

> Severity is not an either/or proposition; it is rather a matter of degree. Thus, any attempt to formulate a general rule would almost inevitably result in a threshold requirement of severity so high that only a handful would meet it, or so low that it would be an ineffective screen. A middle-ground rule would be doomed, for it would call upon courts to distinguish between large numbers of cases factually too similar to warrant different treatment.

Boyles v. *Kerr*, 855 S.W.2d 593, 600 (Tex. 1993) (quoting Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 511 (1982)). Phrases open to widely differing interpretations, such as "serious" or "reasonable," thus will fail to limit liability or reliably distinguish genuine claims.

It may well be that courts and juries frequently determine "negligence," and that what constitutes "negligence" is not much clearer than what constitutes "seriousness." However, as Justice Scalia has pointed out, at least "the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm." *Harris* v. *Forklift Sys., Inc.*, 62 U.S.L.W. 4004, 4006 (Nov. 9, 1993) (Scalia, J., concurring). By comparison, there is no such limit for claims of emotional distress, where the central issue is whether the plaintiff has suffered genuine harm. Furthermore, that negligence standards may be vague and ambiguous is no reason to compound the problem by obscuring the thresholds of liability for unavoidably intangible and subjective claims.[15]

Not only do vague standards fail to resolve the problems that have moved the courts to limit liability for emotional distress, they also unnecessarily extend litigation. A vague standard invites disputes of material fact, and thus reduces the possibility of eliminating meritless claims on summary judgment.[16] For example, experts may submit contradictory affidavits on whether the plaintiff's distress is "serious" because the elasticity of the concept permits each to harbor a different view of what constitutes "serious" distress.

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[14] *E.g.*, *Sell* v. *Mary Lanning Memorial Hosp. Ass'n*, 243 Neb. 266, 271, 498 N.W.2d 522, 525 (1993).

[15] As Oliver Wendell Holmes stated in describing the common law, "[i]f in the whole department of unintentional wrongs the courts arrived at no further utterance than the question of negligence, and left every case, without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they required the defendant to know, and would assert, by implication, that nothing could be learned by experience." Oliver Wendell Holmes, *The Common Law* 111-12 (1881).

[16] *See Knake* v. *King*, 492 N.W.2d 416, 417 (Iowa 1992); *Gordon* v. *Alaska Pac. Bancorporation*, 753 P.2d 721, 725 (Alaska 1988). *See generally* Richard A. Posner, *Economic Analysis of Law*, 543-44 (1992) (discussing costs of vague standards including inefficiency due to having to apply the standard in every case, and lack of deterrence).

These concerns have led common law courts to fashion clear, though differing, rules in cases involving claims of emotional distress. Many courts, for example, have insisted on physical injury, the threat of physical injury, or physical manifestations of mental disturbance as a prerequisite to recovery. In another type of emotional distress case, involving alleged fear that an implanted medical device might fail, courts have insisted on concrete proof that the plaintiff's own device was defective.[17] In cases based on fear of disease, they have imposed a well-defined threshold requirement of proof that the plaintiff was actually exposed to the disease.[18]

The lesson of these cases is that the Court must draw some line, and faced with that obligation, it ought to draw a clear one.

III. THE COURT SHOULD ALLOW EMOTIONAL DISTRESS CLAIMS ONLY BY PERSONS INJURED OR THREATENED WITH INJURY BY THE DEFENDANT'S CONDUCT.

As this court recognized in Buell, the common law provides a menu of standards from which this Court can "glean[] guidance." 480 U.S. at 568-70. The Court should draw on the lower courts' experience with varying rules and adapt those standards to the context of FELA.

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[17] *E.g.*, *Walus* v. *Pfizer, Inc.*, 812 F. Supp. 41, 45 (D.N.J. 1993); *Spuhl* v. *Shiley, Inc.*, 795 S.W.2d 573, 580-81 (Mo. Ct. App. 1990).

[18] *Hare* v. *State*, 570 N.Y.S.2d 125, 127, *appeal denied*, 78 N.Y.2d 859, 580 N.E.2d 1058 (1991); *Burk* v. *Sage Prods., Inc.*, 747 F. Supp. 285, 287 (E.D. Pa. 1990).

A. The Zone Of Danger Rule Fulfills The Policies Of FELA And Of The Common Law.

The policies that emerge from a century of tort jurisprudence apply fully to FELA cases. Under FELA, as at common law, the Court must screen out trivial or evanescent episodes of emotional distress and place meaningful boundaries on potentially expansive vistas of liability. Under FELA, as at common law, the Court must erect adequate safeguards against meritless claims, because emotional injuries in either context are hard to measure, easy to exaggerate, and difficult to disprove. And under FELA, as at common law, the Court must afford clear direction to lower courts and litigants regarding when claims for emotional distress will be recognized. To do otherwise is to leave the law in disarray, to foment unnecessary litigation, and to ensure the need for further review by this Court in the future.

Indeed, the policies of the common law assume added importance in FELA cases. In negligence actions, the plaintiff typically must prove breach of a duty to the plaintiff, injury, and causation. Under FELA, the plaintiff's burden is much lighter. In particular, FELA has severely restricted causation as a way of cabining liability. *See H.W. Mitchell* v. *Missouri-Kansas-Texas R.R.*, 786 S.W.2d 659, 661 (Tex.), *cert. denied*, 498 U.S. 896 (1990) (holding that "common law proximate cause plays no part in determining liability in a FELA case and requiring proof of it is reversible error"), *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 116-17 (1963).

Because of the plaintiff's reduced burden under FELA and the potentially limitless nature of emotional distress claims, the Court must shun expansive or vague rules of liability or duty lest employers become insurers of the psychological well-being of their employees. *See Inman* v. *Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959). Petitioner Conrail urges that the Court recognize only those claims of emotional distress arising from actual or threatened physical impact on the plaintiff. PLAC supports this standard. It is well-developed in the common law courts, as it is the prevailing view in many jurisdictions. *See* Appendix to Petitioner's Brief (listing jurisdictions). It is easily applied. And it builds upon the experience of the common law while advancing the purposes of FELA.

Tort law functions most reliably when performing those inquiries which it was designed to undertake and which it pursues regularly. The primary focus of tort law, as well as FELA, is personal safety. *See Wilkerson* v. *McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring). Courts in both contexts are experienced in examining the physical harm resulting from the defendant's conduct, or the threat to health and safety that it posed. Petitioner's proposed standard, which focuses on actual or potential harm to personal safety—on whether the plaintiff was in the "zone of danger" created by the defendant's conduct—thus comports with the thrust of tort jurisprudence. *See* Pearson, 34 U. Fla. L. Rev. at 515-16. Because the law has already addressed so many of the situations involving threats of physical harm, the legal system can readily accommodate this standard.

Applying this test under FELA would further the common law policies discussed above. First, because the zone of danger test focuses on justifiable fear, it winnows out petty claims of bruised feelings or emotional upset.[19] Second, the test provides an assurance of genuineness—an objectively verifiable factual scenario which could be ex-

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[19] *Rickey* v. *Chicago Transit Auth.*, 98 Ill.2d 546, 554-55, 457 N.E.2d 1, 4-5 (1983) (zone of danger rule would not encourage "frivolous litigation"). Moreover, by recognizing that a near miss may be as frightening as an actual impact, this standard also alleviates the harshness that led some courts applying the pure physical impact rule to trivialize that requirement. *See, e.g., M.B.M. Co.* v. *Counce*, 268 Ark. 269, 278-81, 596 S.W.2d 681, 686-88 (1980); *Zelinsky* v. *Chimics*, 196 Pa. Super. 312, 318, 175 A.2d 351, 354 (1961).

pected to produce serious emotional distress.[20] And, third, it is clear, brightly marking the boundaries of liability.

Perhaps most importantly, the zone of danger approach delineates some reasonable outer limits on liability while allowing recovery for those plaintiffs most likely to be affected. By defining the class of potential plaintiffs as those who were themselves at risk of harm, the rule avoids the impossible task of distinguishing among bystanders and others—*e.g.*, fathers, mothers, grandparents, siblings, those who saw the accident contemporaneously, those who did not, those who heard the accident, and those who heard of it—to determine who might foreseeably suffer emotional distress. By identifying the compensable harm as fear for one's own safety, the rule advances the goals of FELA. To allow recovery merely for witnessing an unpleasant sight, for example, would tie damages to factors unrelated to workplace safety, such as how many observers were present, the clarity of their view, and their proximity to the event. As the Fifth Circuit observed in *Gaston* v. *Flowers Transportation*,

> Because they are irrelevant to that operation, visiting exponential damages on an employer on the basis of such factors is not only random and wayward, but serves in no way to advance the major subsidiary purpose of affording such remedies as those of the FELA/Jones Act to trainmen and seamen: to hold out incentives to their employers to reduce dangers and to operate safely.

866 F.2d 816, 820 (5th Cir. 1989). As the zone of danger test is so closely linked to personal safety, it would

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[20] *See Stadler* v. *Cross*, 295 N.W.2d 552, 554 (Minn. 1980) (reaffirming zone of danger rule because "courts and juries can objectively determine whether plaintiffs were within the zone of danger . . . [and] plaintiffs can be cross-examined regarding whether their fear was for themselves or for another"). *Cf. Prosser* § 54, at 364 ("[t]he true value of the impact requirement may lie in the opportunity which is afforded to the defendant to testify that there was in fact no impact").

encourage appropriate behavior and efficient use of limited resources.[21]

The major criticism of the zone of danger rule is that it is arbitrary. *Gottshall*, 988 F.2d at 361. Individuals inches outside the zone of danger, it is contended, may suffer as much emotional distress as the person inside the zone, yet those outside cannot recover. However, the only alternatives to the zone of danger approach are to impose no limit on liability besides foreseeability, to create other distinctions, or to adopt the Third Circuit's ad hoc approach. None improves upon the zone of danger rule.

To allow liability to flow unchecked to the farthest reaches of foreseeability is, as observed above, unwise and destructive. *See* pp. 5-8, *supra*. To fashion other limitations merely draws different and, if anything, less defensible distinctions among potential plaintiffs. Thus, for example, courts attempting to venture beyond the zone of danger in allowing bystanders to recover have become entangled in a web of inconsistencies. The mother who saw her child hit by a car could recover. *Dillon* v. *Legg*, 68 Cal. 2d 728, 441 P.2d 912 (1968). The mother who saw her children only an instant later, bloodied and dying, could not. *Parsons* v. *Superior Court*, 81 Cal. App. 3d 506, 512 (1978). A husband present at his wife's death was able to sue, *Krouse* v. *Graham*, 19 Cal. 3d 59, 76-77, 562 P.2d 1022, 1031 (1977), but an unmarried man could not recover for viewing the death of his longtime cohabitant. *Elden* v. *Sheldon*, 46 Cal. 3d 267, 277, 758 P.2d 582, 588 (1988).

The problem with these distinctions is that the courts have recognized a compensable harm—distress regarding

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[21] The Court should be aware that in other contexts, such as fear of disease litigation, different or additional threshold standards may be appropriate. *See, e.g.*, *Rabb* v. *Orkin Exterminating Co.*, 677 F. Supp. 424, 428 (D.S.C. 1987) (plaintiff must prove feared future medical condition is "reasonably certain" to occur); *O'Brien* v. *Medtronic, Inc.*, 149 Wis. 2d 615, 621-22, 439 N.W.2d 151, 153-54, *review denied*, 446 N.W.2d 286 (Wis. 1989) (plaintiff must prove device is defective or has malfunctioned).

an injury to another person—and then artificially limited recovery in a manner unrelated to the existence or severity of that harm. The zone of danger rule, by contrast, is consistent. It allows as a compensable injury a well-founded fear for one's own personal safety, and it imposes no artificial barriers to recovery for that fear.[22] It is not arbitrary to limit liability to serve policies other than compensating persons allegedly subjected to mental distress, so long as the limitations consistently and fairly effectuate those goals.[23] The zone of danger rule does so. The alternatives do not.

The Third Circuit's approach of abandoning any standard and relying solely upon a "review of the factual indicia of the genuineness of a claim," *Carlisle*, 990 F.2d at 98, imports its own brand of arbitrariness. If limits "cannot be consistently and meaningfully applied by courts and juries, then the imposition of liability would become arbitrary and capricious. Consequently, the cause of just apportionment of the losses would suffer." *Stadler*, 295 N.W.2d at 554; *see D'Ambra* v. *United States*, 114 R.I. 643, 650, 338 A.2d 524, 527-28 (1975) (noting that "jury determination of potential liability, unfettered except by some vague concept such as foreseeability, would rapidly lead to exceedingly uneven parameters of liability").

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[22] However, this Court need not decide here whether it wishes to carve out specific exceptions to the zone of danger rule for individuals closely related to an injured worker, *e.g.*, parents, who suffer mental distress because of those injuries and not because of fear for their own safety. The issue is not presented in this case, nor is it likely to arise frequently in FELA litigation. *See Gottshall*, 988 F.2d at 372.

[23] If the test of arbitrariness were whether a rule bars recovery by a person injured through the negligence of another, then many boundaries in the law of torts would qualify. Statutes of limitation, contributory negligence, and sovereign immunity all deny relief to injured parties. The reason these are not arbitrary is that they serve policies other than compensation of plaintiffs.

In sum, the common law rule recognizing only those claims of emotional distress arising from actual or threatened physical impact on the plaintiff serves the policies of FELA. This standard allows recovery for justifiable fear while providing clear boundaries of liability and guarantees of genuineness.

B. This Court Should Provide Guidance Regarding The Factual Inquiry That Must Occur After The Zone Of Danger Test Is Met.

The zone of danger test is not the end of a trial court's inquiry. It is the beginning. It provides reassurance regarding the genuineness of emotional distress claims, but not an ironclad guarantee. It delimits who may *not* recover, but does not establish the plaintiff's entitlement to damages. It affords some reason to believe the emotional distress is serious, but no more than reason to believe. It is, as advertised, a threshold test.

Once the plaintiff clears this threshold, he or she still has to prove the case. The finder of fact—be it judge or jury—still must determine whether the claim of emotional distress is serious, authentic, and tied to the negligence of the defendant. While the inquiry, like any factual review, must be flexible, this Court should provide guideposts.

Specifically, even one in the zone of danger created by the defendant's conduct ought not to recover for trifling or fleeting distress, but rather only for serious or severe distress. Recognizing the vagueness of this factor—which disqualifies it as a threshold test—many courts have gauged the seriousness of emotional distress by whether the plaintiff has exhibited physical symptoms attributable to the mental disturbance.[24] As the Supreme Court of New Hampshire phrased this standard, the plaintiff must allege and prove that she suffered physical harm as a result of the conduct which caused the emotional distress. *Thorpe* v. *State Dept. of Corrections*, 133 N.H. 299, 303-04, 575 A.2d 351, 353-54 (1990). Further, the harm "must be susceptible to some form of objective medical determination and proved through qualified medical witnesses." *Id.* at 303, 575 A.2d at 353 (quoting *Corso* v. *Merrill*, 119 N.H. 647, 653, 406 A.2d 300, 304 (1979)).

Physical manifestation of injuries is thus useful in distinguishing serious from insubstantial emotional distress. It also provides additional assurance that the claim is genuine.[25] That the physical manifestation requirement is overinclusive—that it might let through its screen some claims of emotional distress which in fact are not genuine or serious—suggests only that it is best used as urged here, as one factor in a flexible factual analysis undertaken *after* the threshold standard has been met. The contention that the physical manifestation criterion is underinclusive—that it may exclude legitimate claims of emotional distress which happen not to be accompanied by any physical symptoms—has been asserted, but not proved. As the *Restatement* notes, physical consequences are a hallmark of serious harm to psychological health.

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[24] *See, e.g., Muchow* v. *Lindblad*, 435 N.W.2d 918, 921-22 (N.D. 1989) (insomnia and weight loss were "transitory and inconsequential" and therefore not the requisite "bodily harm"); *Corso* v. *Merrill*, 119 N.H. 647, 652-53, 406 A.2d 300, 304 (1979) (physical symptoms guarantee "that the emotional injury is sufficiently serious to be afforded legal protection"); *Restatement (Second) of Torts* § 436A cmt. b (1965) (noting "emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern itself with trifles").

[25] Claims of mental anguish unaccompanied by physical injuries "are more often assumed than real—and the suit too liable to be wholly speculative." *Ruth* v. *Fletcher*, 237 Va. 366, 372, 377 S.E.2d 412, 415 (1989). The Supreme Court of Rhode Island, despite recognizing advancements in the field of psychiatry, reaffirmed its requirement of physical symptomatology on this basis: "because of the nature of the illness it is too difficult to substantiate absent objective physical symptomatology." *Reilly* v. *United States*, 547 A.2d 894, 897 (R.I. 1988).

Restatement (Second) of Torts § 436A cmt. b. In any event, as noted, this measure is not proposed as a rigid precondition of recovery, but rather as an evidentiary guidepost in a detailed factual inquiry. It is sufficiently linked to the policies of the common law and of FELA to serve that function well.

The court in its factual inquiry should also consider whether the plaintiff has suffered the degree of distress that a reasonable person, normally constituted, would experience in reaction to the negligent conduct in issue. Common-law courts have generally rejected the "eggshell skull" rule in claims of emotional distress.[26] In other words, contrary to the practice with respect to physical injuries, the defendant does not take the plaintiff as she finds him. As Prosser states, the standard "is an objective one, which excludes liability for hypersensitive mental disturbance." *Prosser* § 54, at 365 n.60.

The rationales for this approach are compelling. First, without an objective standard by which to measure liability and damages in an emotional distress case, the judge and jury would be at sea. Once the zone of danger test was satisfied, the plaintiff's distress, for all practical purposes, would be whatever he said it was, and the court would have little basis to second-guess. Second, the reasonable person limitation also keeps damages in proportion with culpability.[27] The zone of danger standard does not necessarily perform this function. It is, as noted, a threshold standard. Third, imposing liability for the anomalous or bizarre emotional reaction would not make the workplace safer.[28]

Particularly under FELA, where the proximate cause requirement is attenuated, the Court should be wary of compensating plaintiffs for idiosyncratic reactions. In *Gottshall,* for example, posttraumatic stress syndrome is not a normal reaction to the death of a friend.[29] In *Carlisle,* a nervous breakdown is not a reasonable reaction to workplace stress.

Once again, this reasonable person standard is one factor for the judge and jury to consider in determining whether the plaintiff has proved the case. But it is an important factor. It is difficult to imagine when it would be proper for a plaintiff to recover for an unreasonable fear or a preposterous emotional reaction. On the other hand, standing alone, the reasonable person standard by itself is too tied to specific facts, too vague and too shorn of objective content to serve as a threshold test of liability. It is a guidepost, and the courts should use it as such.

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[26] *See, e.g., Sullivan* v. *Boston Gas Co.*, 414 Mass. 129, 132, 139-40, 605 N.E.2d 805, 807, 811 (1993); *Sell*, 243 Neb. at 271, 498 N.W.2d at 522; *Shuamber* v. *Henderson*, 579 N.E.2d 452, 456 (Ind. 1991); *Thing*, 48 Cal. 3d at 667-68, 771 P.2d at 829-30.

In emotional distress cases under FELA, courts have also rejected the eggshell skull rule. *See Plaisance* v. *Texaco, Inc.*, 966 F.2d 166, 168-69 (5th Cir.) (en banc) *cert. denied,* 113 S. Ct. 604 (1992) (where experienced seaman would not have suffered such an emotional reaction, plaintiff seaman's injuries were not reasonably foreseeable); *Teague* v. *National R.R. Passenger Corp.*, 708 F. Supp. 1344, 1350 (D. Mass. 1989) (requiring that "reasonable person would have suffered emotional distress under the circumstances of the case"). *But see Pierce* v. *Southern Pac. Transp. Co.*, 823 F.2d 1366, 1372 n.2 (9th Cir. 1987) (seeing "no principled reason why the eggshell plaintiff doctrine should not apply").

[27] For example, courts have denied recovery in the following cases: *Ford* v. *Aldi, Inc.*, 832 S.W.2d 1 (Mo. App. 1992) (vomiting for more than 36 hours upon finding insect in food); *Howard* v. *Mt. Sinai Hosp., Inc.*, 63 Wis. 2d 515, 217 N.W.2d 383, *reh'g denied*, 63 Wis. 2d 515, 219 N.W.2d 576 (1974) (per curiam) (fear of developing cancer due to broken catheter); *Caputzal* v. *Lindsay Co.*, 48 N.J. 69, 222 A.2d 513 (1966) (heart attack at sight of brownish water from faucet).

[28] Thus, for example, in the related context of Title VII, where the goal is a workplace free of discrimination, the statute forbids conduct creating an "environment that *a reasonable person* would find hostile or abusive." *Harris*, 62 U.S.L.W. at 4005 (emphasis supplied).

[29] *Cf. Meracle* v. *Children's Service Soc'y*, 149 Wis. 2d 19, 30, 437 N.W.2d 532, 536 (1989) ("distress that is usually experienced by close relatives when illness strikes a family member is normal and is not compensable").

CONCLUSION

The judgments of the court of appeals are out of step with the policies of the common law and of FELA. They should therefore be reversed.

Respectfully submitted,

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November 24, 1993

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No. 92-1956

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3 of the rules of this Court, the Washington Legal Foundation respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner. The petitioner has consented to the filing of this brief; however, the respondents have refused to provide consent.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 100,000 members and supported nationwide. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses. In particular, WLF has devoted substantial resources to curbing abusive litigation practices, excessive punitive damage awards, excessive attorneys' fees, and unwarranted expansion of tort liability, by publishing monographs and similar educational materials on the subject and by filing *amicus curiae* briefs in appropriate cases. *See, e.g.*, *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *Burlington Northern Railroad Co. v. Ford*, 112 S. Ct. 2184 (1992); *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1992).

WLF submits that the decisions below in this case are a radical departure from the common law on the liability for infliction of mental distress, especially in the workplace setting. If left intact, these decisions will impose significant costs upon businesses not only in the Federal Employers' Liability Act context, but also upon businesses in other areas as well. Such increased costs are ultimately borne by the consumers and workers as a whole. Any such change in employer liability in this area of the law is best left to Congress. WLF can thus bring a broader perspective to the issues in this case than that presented by the parties in this action.

For the foregoing reasons, movant WLF respectfully requests that it be allowed to participate in this case and file the annexed brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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No. 92-1956

IN THE
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Consolidated Rail Corporation,

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v.

James E. Gottshall *and* Alan Carlisle,

Respondents.

BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The decisions below correctly noted that "[i]n deciding which injuries are compensable under the [Federal Employers' Liability Act], FELA jurisprudence 'gleans guidance from common-law developments.'" Pet. App. A-9, A-79 (quoting *Atchinson, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 568 (1987)). Yet by permitting recoveries for mental anguish resulting from work-related stress, and not from any actual or threatened physical injury, the Third Circuit departed radically from the teachings of the common law.

At common law, there is simply no "tort" of negligent infliction of emotional distress. Common law courts do employ various tests for allowing or disallowing a claim based on negligent infliction of emotional distress, but these tests define an expanded rule of damages for conduct that is already understood to be tortious, rather than defining a distinct tort. There is no general duty to exercise reasonable care to avoid bringing stress upon another person. Only in cases of intentional infliction of emotional distress, involving extreme and outrageous conduct, does the common law hold a party liable absent conduct that is tortious on some other ground.

The common law doctrine has a sound policy basis. Mental distress is so unpredictable that liability for negligent infliction of emotional distress would be difficult for employers to guard against and expensive to insure. If any derogation from the common law doctrine is to occur with respect to workplace stress, however, the decision should be made by Congress, which can better set out balanced, tailored rules to govern employers or authorize an administrative agency to do so.

ARGUMENT

I. UNDER THE COMMON LAW, MENTAL DISTRESS ARISING FROM WORKPLACE STRESS IS NOT COMPENSABLE

In deciding claims of negligent infliction of emotional distress, the lower courts have virtually all followed one of three rules of liability. Classically, courts required an *actual* physical impact for recovery for mental distress, an approach that a minority of jurisdictions continue to use today. *See* William L. Prosser, John W. Wade & Victor E. Schwartz, *Cases and Materials on Torts* 396 (8th ed. 1988) (hereinafter "Prosser"); Richard N. Pearson, *Liability to Bystanders For Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 486-88 (1982). Under this rule, liability for negligent infliction of emotional distress establishes no new category of tortious conduct; rather, it simply provides for an additional category of damages.

Second, a more widely-employed rule at common law is the "zone of danger" rule. That rule permits liability to be based on anguish suffered by a bystander when witnessing the injury of another person, where the bystander was himself or herself physically endangered (but not injured) by the accident. *See* American Law Institute, *Restatement (Second) of Torts* § 313(2) (1965) (hereinafter "*Restatement*"); *Gillman v. Burlington Northern R.R.*, 673 F. Supp. 913, 917 n.1 (N.D. Ill. 1987) (collecting authorities).

Third, the zone of danger rule is expanded in some jurisdictions to include a bystander who was not within the zone of danger, but who was a close relative of the victim. *See* Prosser, *supra*, at 407-08; *Thing v. La Chusa*, 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814 (1989) (in bank). This rule would permit liability where, for example, a mother has witnessed a car striking and injuring her child. Like the physical impact rule, neither the pure zone of danger rule nor the close relative rule establishes a new category of tortious conduct. Instead, they apply in cases involving conduct that was tortious with respect to the victim, and permit recovery by an additional category of claimants.

Finally, some jurisdictions permit a recovery for mental distress stemming from negligence in the rendering of certain services. *See, e.g.*, Joseph J. Kelleher, Note, *An Attorney's Liability For the Negligent Infliction of Emotional Distress*, 58 Fordham L. Rev. 1309, 1319-21 (1990) (legal malpractice); Prosser, *supra*, at 402 (negligence by telegraph company in transmitting a message announcing death; negligence in the handling of corpses).

In short, virtually all of the cases allowing a recovery for negligent infliction of emotional distress involved an act that was independently tortious, such as a physical impact, injury to another individual, damage to property, or other tortiously negligent conduct. None of these common law rules establish a general duty to refrain from negligently inflicting emotional distress.

Rather, the common law imposes only a duty to refrain from *intentional* infliction of emotional distress. Even that cause of action is a comparatively recent development. "Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone." *Restatement*, *supra*, § 46 comment b.

Moreover, the cause of action for intentional infliction of emotional distress is further limited by a requirement of extreme and outrageous conduct by the defendant. *See Restatement*, *supra*, § 46(1); *Atchison, T. & S.F. Ry. Co. v. Buell*, 480 U.S. 557, 568 n.16 (1987); *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1502 (1991). "It has not been enough that the defendant has acted with an intent which is tortious or even criminal . . . ." *Restatement*, *supra*, § 46 comment d.

These common law principles, however, were not applied by the court below. The cases under review involved neither intentional infliction of emotional distress nor one of the exceptions to the common law rule barring recovery for negligently caused mental stress. As discussed below, a rule permitting recovery for emotional distress caused by mere negligence, by removing the carefully drawn boundaries of the common law, would have severe detrimental effects.

II. THE DECISIONS BELOW WOULD RENDER EMPLOYERS' LIABILITY UNPREDICTABLE AND THEREFORE MORE DIFFICULT TO INSURE

Unlike the availability of mental distress damages for physical injuries or risks of physical injuries, which simply increase the amount of potential damages for a violation of the existing duty of care, the availability under FELA of a cause of action for negligent infliction of job stress would create new and unworkable rules of conduct for railroads. Moreover, the availability of such a cause of action under FELA could influence lower courts in non-FELA tort and workers' compensation cases to recognize the cause of action as well, with problematic results for employers and ultimately for consumers and employees. *See generally* George D. Bussey, *Mental "Stress" Claims and Workers' Compensation: The Problems and Suggestions for Change*, 43 Federation of Ins. & Corp. Counsel Q. 99 (1993); Peter S. Barth, *Workers' Compensation for Mental Stress Cases*, 8 Behavioral Sciences and the Law 349 (1990); Sara J. Sersland, *Mental Disability Caused By Mental Stress: Standards of Proof In Workers' Compensation Cases*, 33 Drake L. Rev. 751 (1983-84).

Workplace mental distress is far more difficult for an employer to predict and guard against than physical injury. The occurrence of physical injuries, which have a clear physical cause and effect, does not depend mainly on individual characteristics of the victim. The occurrence of emotional injuries, on the other hand, depends entirely on such characteristics. *See* Marc A. Antonetti, *Labor Law: Workers' Compensation Statutes and the Recovery of Emotional Distress Damages In the Absence of Physical Injury*, 1990 Ann. Surv. Am. Law 671, 672. "Where a workman loses a finger because of an errant piece of machinery, the ascertainable i[illegible]y and the work-related cause are direct and simple. H[illegible]ver, emotional distress may have multiple causes, some work-related, others not so related." *Archer v. Indus. Comm'n*, 619 P.2d 27 (Ariz.

Ct. App. 1980). A worker's "personal subjective vulnerability" determines his or her reaction to job stress. Sersland, *supra*, at 757. Moreover, "One can't know how an employee will cope with a stressful job without knowing the quality of his or her family relationships." *Stress and Distress*, Harv. Bus. Rev., July/Aug. 1993, at 9.

From the employer's point of view, the principal difficulty arising from the murky lines of causation in mental stress is not the *post hoc* problem of determining responsibility for it. While claims based on mental stress do present serious evidentiary difficulties, the real problem is that of predicting stress *before* the fact. Given the highly individual nature of responses to stress, an employer who is under a duty to exercise reasonable care to protect employees from job stress cannot do so except by cutting stress across the board -- a goal that could be achieved, if at all, only through revolutionary changes in the workplace. The fact is that a great many jobs, from restaurant kitchen work to heart surgery, from elementary school teaching to litigating, are inevitably stressful.

Nor is it any answer to say that the standard of care could be based on the expected responses of a "reasonable" employee rather than those of the actual employees; the problem lies precisely with the wide range of stress responses to be found in "reasonable" people. "Stress is an elusive phenomenon, determined by motivations and incentives. My stress may be your challenge." Derik R. Girdwood, Comment, *Can I Collect Workers' Compensation Benefits If My Job Drives Me Crazy?*, 1992 Detroit Coll. L. Rev. 591, 610 n.92 (quoting *Reading This May Cause You Stress*, Bus. Week, Oct. 14, 1985, at 170).

The unpredictability of mental distress, and of liability for mental distress under a negligence standard, has an important economic consequence: it will render liability insurance or workers' compensation insurance less available and more costly. Insurance requires that risks be statistically predictable over the long term. *See* Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* 136-37 (1988); Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 Ohio St. L.J. 399, 404-09 (1987). But insurers simply have no means to make the predictions about mental distress that would be necessary to price an insurance product.

The result of higher insurance premiums would be to increase employment costs, and perhaps to reduce employment, in numerous blue collar and white collar fields. It is therefore unsurprising that state legislatures have been overturning or limiting judicial decisions in the workers' compensation context granting claims for negligent infliction of emotional distress. *See* Antonetti, *supra*, at 689; Bussey, *supra*, at 141 n.241.

In the absence of some form of physical impact, the approach of the common law to claims for mental stress has been to draw the line at those intentionally caused by outrageous conduct. This rule not only limits resort to the courts to the most egregious situations, but responds to many of the concerns raised by emotional distress claims. When there is evidence that the defendant acted with the intention of provoking emotional distress, it is at least clear that the *defendant* saw a potential causal relationship between his or her conduct and the plaintiff's reaction. There is also less cause to doubt the genuineness of the plaintiff's injury. Finally, the requirement of *outrageous* conduct demarcates behavior which, even if not precisely defined, should be easily recognized by every reasonable person.

Whereas claims for intentional infliction of emotional distress arguably seek to bring personal conflicts to court before they erupt into less civilized forms of resolution, claims for negligent creation of job-related stress would make litigable objections to the terms and conditions of employment. These are issues that are best addressed through other means, including discussions with supervisors, individual contract negotiations, grievance procedures and collective bargaining, and existing legislation directed at the most serious abuses. Recognition of a cause of action for *negligent* infliction of emotional distress, when the common law had permitted only claims for outrageous, intentional conduct, would expand liability in ways that would be unpredictable, uninsurable, and unwise.

III. ANY DECISION TO RECOGNIZE A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER FELA SHOULD BE MADE, IF AT ALL, ONLY BY CONGRESS

The Third Circuit's decisions not only represent unsound policy, but also plunge the judicial branch into an area in which Congress is better equipped to act. Any regulation of stressful conditions in the workplace should proceed on an incremental basis and with careful adjustment between protection of employees and upheaval of workplace practices. Experience at both the state and federal level shows that these judgments are quintessentially legislative and can be handled through legislative action where appropriate.

In states where claims for workplace stress have been recognized at all, they have been recognized only in the context of a comprehensive scheme of workers' compensation, where the claim is narrowly defined and damages are specifically limited by law. Even so, a number of legislatures have amended their workers' compensation laws to overturn or limit judicial decisions that allowed claims for workplace stress. For example, the Massachusetts legislature overturned a decision that permitted claims based on distress arising from ordinary business operations such as personnel transfers. *See* Antonetti, *supra*, at 689-90. The Michigan legislature overturned a decision allowing claims where the employee merely believed that his or her mental injury resulted from job stress, regardless of whether it actually did. *Id.* at 692-93. Numerous other legislatures have also crafted restrictions on workplace stress claims. *Id.* at 695 & n.217. This type of fine-tuning based on policy considerations is best accomplished through legislative action.

At the federal level, Congress has frequently enacted legislation to address specific sources of workplace stress. In doing so, Congress has had the opportunity to weigh the costs and benefits of regulating particular employment practices and has prescribed specific rules of conduct. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin; the Americans With Disabilities Act, 42 U.S.C. § 12112, prohibits discrimination on the basis of an employee's disability; the Age Discrimination in Employment Act, 29 U.S.C. §§ 623, 631, prohibits age discrimination against individuals between 40 and 70 years old; and the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), prohibits discrimination based on an employee's pregnancy. Each of these statutes prohibits a type of conduct likely to produce emotional distress and provides a defined remedy.

Similarly, the Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (1993), entitles employees to take up to 12 weeks of unpaid leave in a 12-month period on account of childbirth, care of a close relative with a serious health condition, or the employee's own serious health condition. The Occupational Safety and Health Act, 29 U.S.C. §§ 651-78, regulates workplace conditions bearing on employees' health and safety. The Fair Labor Standards Act, 29 U.S.C. §§ 207, 212, regulates, *inter alia*, overtime compensation and the use of child labor. These statutes, too, target sources of emotional distress in the workplace.

Moreover, unlike common law courts, a legislature that seeks to regulate workplace stress can delegate power to an administrative body with the ability to gather information and develop expertise concerning the practices it is to regulate. State workers' compensation programs are administered by workers' compensation boards. *See, e.g.*, Girdwood, *supra*, at 598. The various federal statutes are likewise administered by Executive Branch agencies such as the Equal Employment Opportunity Commission, 29 U.S.C. § 633a(b), 42 U.S.C. §§ 2000e-4, 2000e-5, and the Department of Labor, 29 U.S.C. § 216.

Thus, judicial recognition of a general cause of action under FELA for negligent infliction of emotional distress would not only bypass the judgment of Congress as to which kinds of workplace stress should be compensated, but would also bypass the agencies in which Congress has vested responsibility for regulating workplace conditions.

IV. THE DECISIONS BELOW IMPROPERLY DISREGARDED COMMON LAW IN PERMITTING A RECOVERY FOR MENTAL DISTRESS ABSENT PHYSICAL INJURY OR DANGER OF PHYSICAL INJURY

This Court should adopt the overall common law position, consistent with its statement in *Buell*, by declining to impose a general duty to refrain from negligently inflicting emotional distress. Because *Carlisle* and *Gottshall* were decided incorrectly below under any of the common law rules, whether the physical impact rule, the zone of danger rule, or the variation allowing recovery by a close relative bystander, those decisions should be reversed regardless of the specific rule that this Court adopts.

In *Carlisle*, plaintiff complained of general work-related stress resulting from outdated equipment, long hours, and other factors. Pet. App. A-74-75, A-87. The Third Circuit, upholding "for the first time" a recovery based on "negligent infliction of emotional distress arising from work-related stress," declined to apply any of the common law rules circumscribing the availability of damages. Pet. App. A-89. Far from "glean[ing] guidance from common-law developments," the Third Circuit went

beyond even the most expansive of the mainstream common law rules. As discussed in part I, the difference is not simply one of degree: Unlike the availability of mental distress damages for physical injuries suffered by oneself or by another, which simply increases the amount of potential damages for a violation of an existing duty of care, the decision below creates a new and far-reaching primary rule of conduct.

In *Gottshall*, the plaintiff is clearly not entitled to recover under the physical impact rule, since he himself suffered no injury. Nor is he entitled to recover as a close relative bystander -- the Third Circuit's expansion of this concept to include close friends has no grounding in the common law.[1] However, under the zone of danger rule the analysis becomes more complex.

Most of the conduct cited by plaintiff as a basis for his claimed damages -- forcing plaintiff to work while his friend's body lay beside the track, working the men "even harder" the following day -- are plainly insufficient to justify imposing liability on the railroad. However, plaintiff also appears to rest his claim, at least to some extent, on the fact that he was working under the same conditions (excessive heat and humidity, insufficient breaks) that led to his friend's heart attack, and feared that he might suffer the same fate. On superficial examination, this might appear sufficient to bring plaintiff himself within the zone of danger, within the meaning of that test.

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[1] The court below failed to note that the "seminal case" among those it relied upon for its expansion of the bystander rule, *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), had been clarified in *Thing v. La Chusa*, 48 Cal. 3d 644, 257 Cal. Rptr. 865, 771 P.2d 814 (1989) (in bank), so as to preclude any such expansion. *See* Pet. App. A-10. Moreover, in rejecting familial status as a basis for determining bystander recovery, the court failed to note that bystander recovery for close relatives had itself begun life as an exception grafted onto the zone of danger rule. *See* Prosser, *supra*, at 407.

More rigorous analysis, however, clearly demonstrates that any such conclusion would be an unwarranted expansion of the zone of danger rule. To be meaningful, the concept of "danger" must consist of something more than normal working conditions. For any employee whose job involves heavy physical labor, performed outdoors, hot humid weather is simply a normal working condition in the summer months (as is cold, icy weather in the winter). And a fellow employee may suffer a heart attack, stroke, or other sudden severe illness in any circumstances. The emotional strain that stems from witnessing such an occurrence is analytically no different than the stress experienced by an office worker who is forced to continue work after seeing a co-worker at the next desk collapse from a heart attack -- and fears that the stress of the job could have a similar effect on him or her. Thus in *Gottshall*, as in *Carlisle*, the decision below was plainly improper and must be overturned.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents

BRIEF ON BEHALF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

Southeastern Pennsylvania Transportation Authority ("SEPTA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused.

SEPTA is a statutorily-created government agency which operates a mass transit system in the Philadelphia Metropolitan area. SEPTA also provides commuter rail lines and, therefore, is subject to the Federal Employer's

Liability Act, 45 U.S.C. §§51-60. (FELA) SEPTA has approximately 1,500 workers who are covered by FELA.

Under Pennsylvania law, negligence claims brought against SEPTA – a Commonwealth agency – are limited to the exceptions set forth in the Sovereign Immunity Act. 42 Pa. C.S.A. §8501, et seq. SEPTA has a limitation on damages under its immunity statute for tort actions, however, there is no limitation on damages under the FELA. The interest of SEPTA arises from the fact that the case will have an impact on its claims budget, as well as its operating budget. The decision will increase the cost of litigation and the payment for FELA claims. SEPTA, like many government agencies, has budgetary problems. An increase in the FELA payment will divert limited resources. Any budgetary shortfalls due to an increase in FELA payments would have to be sought through local, state or federal funding sources or an increase in the fare box.

The policy considerations for placing limitations on emotional distress claims were not fully explored by the Third Circuit. SEPTA believes that the policy concerns will not be addressed in the petitioner's brief. Therefore, this amicus brief will aid the Court in addressing the policy issues underlying the need for limitations on claims for emotional stress.

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No. 92-1956

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,
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BRIEF ON BEHALF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

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PARTY TO PROCEEDING

Amicus Curiae Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA") is a statutorily-created Pennsylvania Commonwealth agency, which operates a mass transit system in the Philadelphia Metropolitan area. SEPTA provides bus, trolley, subway-elevated and commuter rail services. Because SEPTA operates certain commuter rail lines, it is subject to the Federal Employers' Liability Act (hereinafter "FELA"), 45 U.S.C. §§51-60.

Under Pennsylvania law, negligence claims brought against SEPTA – a Commonwealth agency – are limited to the exceptions set forth in Pennsylvania's Sovereign Immunity Statute. 42 Pa. C.S.A. § 8501, *et seq.* Because it is a Commonwealth agency, subject to the FELA, it is not necessary for SEPTA to file a petition for leave to file an amicus brief.

SUMMARY OF ARGUMENT

Amicus SEPTA respectfully suggests that the test of "foreseeability" enunciated by the Third Circuit in the instant cases provides employers, their counsel and other litigants with virtually no meaningful guidance on what constitutes a claim for emotional distress under the FELA. The fact is that railworkers are from time to time subject to working conditions that are actually dangerous, to say nothing of "stressful". The risk of *physical harm* to such a worker on account of such circumstances is recognized and, at least to a degree, definable. But there is no limit, at all, on the number of people who might suffer – or claim to suffer – some emotional injury arising out of *stress.* Everyone can claim to be affected by stress. Indeed, as a practical matter, the Third Circuit's formulation precludes virtually all successful summary judgment motions and every claim must be tried. The increased costs – in judgments, settlements and lawyers' fees — are likely to be substantial and will be very damaging to an agency, like SEPTA, with a limited budget and continuing capital needs.

Given the obvious problems presented by the Third Circuit's standard, SEPTA urges this Court to adopt a different formula that will provide standards by which an employer can assess liability. Such a standard would be consistent with the limitations imposed by other Courts of Appeal. SEPTA suggests that test should be a "physical impact" standard. Alternatively, SEPTA suggests that the "zone of danger" test, as enunciated by Conrail, be accepted. Both rules result in payment of claims that are most likely to be genuine because emotional harm inflicted when there is an impact or in the setting of a "near miss" is much more likely to be real than alleged emotional harm to a person merely witnessing an event or far-removed from the scene of an injury. Finally, either the impact or zone of danger rules can be applied with certainty and will avoid the necessity of conducting a trial in every case.

ARGUMENT

A. The Third Circuit Has Failed To Provide Any Guidance With Regard To Limitations On Claims For Emotional Distress Under the FELA

Prior to the decision in *Gottshall v. Consolidated Rail Corp.*, 998 F.2d 335 (3rd Cir. 1993), a plaintiff could not recover for emotional injury that did not result from a physical impact, or at least the threat of such impact. *See, e.g., Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3rd Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 970 (1991). The Court of Appeals for the Third Circuit has now radically departed from its prior rule. In order to compensate an admittedly sympathetic plaintiff, the Court has effectively eliminated any workable limitation on claims for emotional distress. In so doing, it has permitted bad facts to make bad law.

Gottshall does not provide the trial courts with useful instructions on how they are to determine whether a given injury is of a type appropriately compensated under the FELA While ostensibly applying the traditional common law tort requirements of breach of duty, causation, foreseeability and injury, the court has for all practical purposes left the decision to be resolved by *ad hoc* determinations by different judges as to whether a given emotional condition is or is not "foreseeable." Indeed, in *Gottshall*, the court never even identified the negligent conduct at issue, suggesting only that emotional distress might be foreseen in the case of witnessing the death of a friend. In fact, however, the damages claimed by Gottshall did not arise solely from his witnessing a friend's death: Gottshall's complaint was really about the working condition for the entire track gang.

After *Gottshall*, in *Consolidated Rail v. Carlisle*, 990 F.2d 90 (3rd Cir. 1993), the Third Circuit went further allowing a stress related claim where the only duties to be performed were those of a dispatcher. *Carlisle* severed all ties to the common law and abandoned any meaningful analysis of the character of the employer's tortious activity. It now appears that there need be no incident that causes physical impact or the threat of physical impact; there need be no incident that could be characterized as outrageous or unconscionable; there need be no incident during which a plaintiff witnesses a distressful event. Indeed, there need be no incident at all. Rather, the Third Circuit has ruled that general work conditions that create stress can be the basis for liability for emotional injury under the FELA *Carlisle*, 990 F.2d at 97. After all, the "tortious acts" that gave rise to liability in *Carlisle* were: reducing the work force; requiring employees to work longer hours; and failing to upgrade railstock and switching equipment. *Id.* at 92. Therefore, according to the Third Circuit, "tortious activity" can include business and management decisions that, in the aggregate, cause stress to certain workers.

Contrary to this Court's instruction in *Atchison, Topeka & Sante Fe Ry. Co. v. Buell,* 480 U.S. 557, 568 (1987), that courts must consider both "the nature of the injury and the character of the tortious activity," the Third Circuit omitted an analysis of the character of the employer's tortious activity and focused solely on the nature of the plaintiff's injury. The Third Circuit reasoned that as long as the plaintiff can prove that his emotional injury is genuine, the FELA provides a remedy. *Carlisle,* 990 F.2d at 94. The Third Circuit adopted no single standard for weighing the "genuineness of emotional injury claims". *Id.* at 98. Rather, the Third Circuit suggested that indicia of the genuineness of the claim should be assessed by applying traditional negligence elements of duty, foreseeability, breach and causation. If this is the only guidance, however, the courts are left with no meaningful guidance as to what will be a valid claim and all cases must be tried. In contrast to the Third Circuit, most courts examining these common law concepts have raised legitimate concerns about the dangers associated with the claims for emotional distress and sought to place definable guidelines for recovery.

B. The Third Circuit Has Discarded All The Limitations Articulated By The Courts For Placing Restrictions On Emotional Distress Claims

Indeed, the Third Circuit has ignored the concerns voiced by most courts in attempting to place limits on claims for emotional distress. The principle concerns are: (1) unlimited liability; (2) the increase of litigation and fraudulent claims, and (3) the need for predictability. *See* Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?* 67 Wash. L. Rev. 1 (1992).

The concern for exposing defendants to potentially unlimited liability, and thereby placing too onerus a burden on defendants' beneficial activity, has been the most lasting policy limitation for mental distress claims. As Dean Prosser stated:

> There is still the problem of an end to liability, of a place to stop. It is still unthinkable that any one shall be liable to the end of time for all of the results that follow in endless sequence from his single act. Causation cannot be the answer; in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world. Any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts, which would set society on edge and fill the courts with endless litigation.

Prosser, *Palsgraff Revisited,* 52 Mich. L. Rev. 1, 32 (1953).

But if liability for emotional distress is based solely upon foreseeability, then an employer's exposure really is unlimited. As one court pointed out, for example, every individual who saw the television coverage during The Challenger space shuttle disaster was subjected to emotional distress. *See Hinojosa v. South Texas Drilling and Exploration, Inc.,* 727 S.W.2d 320, 324 (Tex. App. 1987). For every such individual present at the location or watching television, the emotional distress was certainly foreseeable. Surely all of these millions of individuals were not suddenly afforded a cause of action. Similarly, in the case of *Gottshall,* all the track workers who were present could claim they suffered stress-related symptoms from overwork on the day in question or even upon learning about the death of a fellow track worker. Likewise, these track workers could file a claim upon learning of Mr. Gottshall's claimed injuries. Other track workers at other locations working under similar conditions could also claim they heard about the incident and then they suffered emotional distress. What the court has set the stage for is an unlimited domino effect.

Moreover, a claim for ***negligent*** infliction of emotional distress does not limit recovery for the intentional acts of the defendant, but rather seeks recovery for mere negligence or "carelessness." But carelessly imposed emotional harm is unavoidable in our society, and it occurs in a wide variety of situations. As the California Supreme Court has put it, "[t]he overwhelming majority of 'emotional distress' which we endure . . . is not compensable." *Thing v. LaChusa*, 48 Cal. 3d 644, 667, 771 P.2d 814, 829 (1989). Even overtime or additional effort due to a major project, under *Carlisle*, could produce claims. Increased work hours due to a reduction in force, a mistake in scheduling, or sickness of co-workers can be characterized as negligent. This characterization must be resolved only by a full-scale jury trial because there would be no legally enforceable limit that would justify a dismissal or grant of summary judgment.

This leads to the second concern – increased litigation. Any suggestion that litigation will do anything other than increase[1] does not take into account the realities of litigation or the difficulty in dealing with a psychiatric claim.[2] The basis of all psychiatric diagnosis is primarily the litigant/patient. Inherently, reliability is suspect. Emotional distress claims will be the soft-tissue injury case of the 1990's. Claims of injury in both types of cases are purely subjective and damages must be proven by expert testimony. In emotional distress claims the expert diagnosis is not as simplistic as the diagnosis of compression fracture at the fourth lumbar vertebra.

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[1] Railroad employment has decreased by 40% in the last decade (1980: 475,930 to 1989: 261,063). Reportable injuries have decreased 60% (1980: 56,428 to 1989: 22,322). However, the FELA payout has increased 130% over the same period. (1980: $343 million to 1989: $789 million). See Baker, *Why Congress Should Repeal The Federal Employer's Liability Act of 1908*, 29 Harv. J. of Legis. 79, 104 (1992)

[2] There is frequently a correlation between the litigation and continuing claims of distress. *See* Melton, Petrila, Paytress & Slobojin, *Psychological Evaluations for the Courts* 283 (1987).

Such a diagnosis involves biological or mechanical tests that would be performed by one orthopedic doctor to the next with a high degree of specificity. *See* Crump, *Evaluating Independent Torts Based Upon Intentional or "Negligent" Inflicting of Emotional Distress. How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 Ariz. L. Rev. 446, n.216 (1992). But a diagnosis of borderline personality disorder, post-traumatic stress disorder, or chronic undifferentiated schizophrenia will not be physically verifiable and requires both interpretation and subjective weighing of multiple simultaneous criteria. Moreover, the diagnostic criteria for psychological disorders usually concern manifestations that also are present in all mentally-healthy persons. Thus, the obsessive-compulsive personality disorder is diagnosed by criteria that are present in some classes of healthy people to a marked degree (e.g., lawyers). American Psychiatric Assn, Quick Reference to the Diagnostic Criteria From DSM- III-R 194-95, 146-48, 113-18 (1987) (summarizing criteria, such as "perfectionism," "preoccupation with details [and] rules," "excessive devotion to work," "overconscientiousness," and "restricted expression of affection" that are virtual survival characteristics for lawyers in high-pressure practices).[3] *Id.* at 199-200.

The point is that the manipulability of diagnostic criteria in psychiatry is of a much greater order of magnitude than dealing with objective physical symptoms.[4] *See also* Alexander D. Brooks, *Law, Psychiatry and the Mental Health System*, chs. 1-3 (1974) (describing psychiatry as it relates to law, as it defines mental illness, and as a behavioral science). There will always be a psychiatrist to testify for the plaintiff. Indeed, expanding recovery for emotional distress will result in a cottage industry for psychiatrists who will testify on behalf of plaintiffs or defendants.[5] As one commentator stated:

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[3] With a physical injury surveillance can be utilized to flush out fraudulent claims. *See* "Carribean Breezes Do Wonders for Injured Worker," *Corp. Legal Times*, Sept. 1993, at 44. In a psychiatric claim the effectiveness of surveillance is limited.

[4] Further, in FELA claims, a claims attorney works on a contingency of 30-40%, therefore, there is an incentive to buildup the damages and, therefore, the treatment. *See* Herde, *FELA: Should It Be Abolished?*, 17 Forum 407 (1981).

> Psychiatrists agree in a much smaller percentage of diagnoses than most other kinds of health-related professionals. Diagnostic criteria are numerous, diffuse and extraordinarily malleable. Accordingly, diagnoses of psychic injuries are subject to ready manipulation by partisan witnesses. Although the same sort of partisan cottage industries exist in a wide variety of other cases (at great cost) the manipulation of the resulting psychiatric evidence could be expected vastly to exceed the distortions in most other cases.
>
> These disadvantages might be tolerable if liability were confined to the kind of outrageous conduct involved in the tort of intentional infliction of severe emotional distress. But when the underlying tort itself is unbounded, as the negligent infliction tort is, the danger arises that a skillful, motivated attorney can contrive very large damages for conduct not really demarcated as culpable.[6]

Crump, supra, at 475.

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[5] For an example of the partisan view of experts, *see* William A. Barton, *Recovering from Psychological Injuries* (1985). This publication by the American Trial Lawyers Association begins, "This is a plaintiff's cookbook filled with proven recipes. . . ." *Id.* at ch. XV, 6. Further, a book informing railroad workers of their rights suggests that they answer as little as possible about an accident. *See,* John H. Blount & J. Edward Dvorak, III, *Justice for the Injured Railroad Worker (And How to Achieve It)* 3-5 (1987). Obviously, after consulting with an attorney or union representative the accident report can be phrased in a way to establish the railroad's negligence.

[6] *See* Platt & Husband, *Post-Traumatic Stress Disorder in Forensic Practice,* 4 Am. J. Forensic Psychology 29 (1986). These authors describe this phenomenon, which they term "role enactment" as a process in which the litigant picks up subtle clues from

Further, reduction of everything to a "foreseeability" test will never permit a summary judgment motion and will result in increased jury trials and increased costs. Even learned judges disagree on what is foreseeable. The difficulty with the foreseeability standard is highlighted by the case of *Plaisance v. Texaco, Inc.,* 937 F.2d 1004 (5th Cir. 1991), *rehearing granted,* 954 F.2d 266 (1992), *opinion upon rehearing,* 966 F.2d 166 (5th Cir. 1992) (en banc), *cert. denied,* ____U.S. ____, 113 S.Ct. 604 (1992). The plaintiff, a seaman, claimed psychic injury from merely seeing an explosion and fire that neither caused nor threatened injury to anyone. A claim was brought under the Jones Act, an act covering Maritime employees, and its underlying statutory structure, the FELA. *Id.* at 1006. His psychiatrist diagnosed post-traumatic stress disorder, a diagnosis that the Fifth Circuit panel described as "baffl[ing]". 937 F.2d at 1011. The Fifth Circuit, addressing the issue of "foreseeability" held that the injury was not a reasonably foreseeable consequence for an experienced seaman. The entire Fifth Circuit then undertook *en banc* review of *Plaisance* on its own motion. The *en banc* court ultimately rejected full recovery for negligently inflicted emotional distress in the FELA context. It cited a

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the attorneys or treating professionals as to the symptoms they might be expected to have. *Id.* at 35. The questions and messages communicated by the professionals may have the effect of covertly influencing the litigant to report additional symptoms, or may reinforce the degree and severity of existing symptoms. This process may be conscious or unconscious. *Id. See also* Simon & Zusman, *The Effect of Contextual Factors on Psychiatrists' Perception of Illness: A Case Study,* 24 J. Health & Soc. Behav. 186 (June 1983). These authors discovered empirically that mental health experts' diagnostic and prognostic decisions correlated highly with the practitioner's forensic position (whether the expert worked for the plaintiff or defendant). *Id.* at 191. For a further discussion, *see* Comment, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress,* 33 Vill. L. Rev. 781, 817-23 (1988).

previous decision, *Gaston v. Flowers Transp.*, 675 F.Supp. 1036 (E.D.La. 1987), *aff'd*, 866 F.2d 816 (5th Cir. 1989), in which a panel of the court had discussed the policy reasons for rejecting a negligently inflicted emotional distress claim: "potentially ruinous liability", "feigned injuries and bogus claims", "exponential damages awarded" in a "random and wayward fashion", and "the difficulty of insuring excessive levels of unpredictable liability." 866 F.2d at 820. The facts of the *Plaisance* case are themselves a strong argument against the negligent-infliction tort: the necessity of three different levels of review to decide *Plaisance* – district court, appellate panel, and *en banc* court-demonstrates the disproportionate costs, manipulable damages, and difficulty of screening out unmeritorious claims that would result if the negligent-infliction tort were recognized in a FELA context.[7] If the test utilized was an impact test, a zone of danger test, or even a bystander test, then summary judgment could have been granted since *Plaisance* could not meet any of these standards. Plaisance suffered no impact, was not in a zone of danger (since another boat was on fire) and there were no injuries to a close relative.

The foreseeability test will result in an increased number of trials. Individuals will not know with certainty if they have a valid claim and employers will not know whether they are liable until all appeals have been exhausted. The Third Circuit's opening of the floodgates not only results in increased costs to employers but also to the court system.[8]

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[7] Even in *Gottshall* there was a split of opinion as to foreseeability. Judge Roth dissented on the grounds that any duty violated was to the decedent and not to Gottshall. Judge Roth stated, "the impact on James Gottshall of any negligence on the part of Conrail could not have been reasonably foreseeable." 988 F.2d at 384.

[8] Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 507-08 (1982); A.B.A., Report of the Action

Because every rail employee is likely to experience some degree of emotional distress, adoption of the position espoused by the Third Circuit would bring every allegation of a headache or disenchantment-induced stress suffered by a rail employee within the province of the FELA. Disagreements between supervisors and subordinates about the workload and/or conditions in the work place exist in every place of employment. Under the Third Circuit standard, a railroad employee has ready access to a jury trial in federal or state court. A railroad employee is no more susceptible to the mental distress that may result in connection with workplace disagreements or stresses than any employee in any other industry. Moreover, other workers are subject to workmen's compensation statutes, which impose limitations on their recoveries for work-related stress.[9] The

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Commission to Improve The Tort Liability System – 1987. Recommendations have been made to repeal the FELA due to increased burdens on the court system. *See* Baker, *supra note* 1, at 87-89.

[9] Significantly, an employee in Pennsylvania who sues for physical injuries suffered as a result of psychological stimulus must prove that the symptoms are "physical injuries" and not simply that the symptoms are merely a manifestation of stress. There must be long lasting physical injury once the cause of mental anguish has been eliminated. *See, e.g., Whiteside v. Unisys Corp.*, W.C.A.B. – A92-1824 (Sept. 30, 1993). Further, the conditions must be abnormal. *See. Calabris v. W.C.A.B.*, 141 Pa. Commw. 405, 595 A.2d 765 (1991). In states which have liberal standards for stress-related workmen's compensation claims, such as Michigan, there is a movement for legislative reform. Comment, *Can I Collect Worker's Compensation Benefits If My Job Drives Me Crazy?*, 2 Det. Coll. L. Rev. 591 (1992); "Reading This May Cause You Stress," *Bus. Week*, Oct. 14, 1985 at 170 reads as follows:

> Most business and professional people insist, usually with pride, that they work under pressure that would fracture lesser mortals. Yuppies in particular regard stressful jobs as status symbols. But not everybody is a yuppie, and more and more employees are saying that they cannot stand up under the stress of their jobs. Some of them are demanding – and getting – hefty payments from employers who subject them to what a court or compensation board thinks is unfair stress.
>
> Figuring out what constitutes unfair stress must be pretty

court noted in *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073, 1090 (E.D. Pa. 1989), *appeal dismissed*, 899 F.2d 1360 (3rd Cir. 1990):

> [P]laintiffs, who allegedly suffer from stress-related physical or purely emotional injuries or illnesses caused by their general working conditions, fail to state a claim under the FELA. Lawyers, doctors, bus drivers, police officers, laborers, and yes, even judges, face stressful conditions every working day. To suggest that Congress intended to single out railroad workers (and seamen under the Jones Act) as worthy of special protection from such stress would be pure folly. Job-related stress is simply not the type of problem intended to be dealt with by the FELA.

Permitting FELA claims for wholly mental injuries will inhibit the exercise of management prerogative and the smooth operation of the nation's railroads.[10] Railroad

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NOTES *(Continued)*

stressful itself. At least it is leading to some rather peculiar outcomes. The Kentucky Workers' Compensation Board awarded Gary Pearl, a white sanitation worker in Louisville, maximum benefits and a job change because he could not endure the stress of working with blacks. A woman won an award because she suffered a nervous breakdown when her employer told her she was being transferred.

Let's all keep calm and ask quietly: What in heaven's name is going on here? Will employers have to redesign jobs to eliminate stress? Stress is an elusive phenomenon, determined by motivations and incentives. My stress may be your challenge. What will happen when to already lagging U.S. productivity, to the struggle to compete with Japan and other countries, if people who can't cope with stress in their jobs are rewarded with resources produced by people who can? It may be too much to expect judges and compensation boards to ponder such issues. But the rest of us should.

[10] Both plaintiffs in *Gottshall* and *Carlisle* had disputes concerning their working conditions which could have been resolved through the grievance mechanism in place in their collective bargaining agreement.

employers should not have to confront the prospect of FELA litigation absent actual or threatened physical contact[11] which the statute was intended to redress. Such a result is at odds with the FELA's legislative intent and public policy.[12]

C. Congress Did Not Intend To Provide Recovery For Emotional Distress Under the FELA in the Absence of Some Precipitating Physical Injury

The Third Circuit's new rule goes well beyond what Congress intended when it passed the FELA. The types of injuries that Congress intended to cover are described in the Act's legislative history. Senate Report No. 432, 61st Congress, 2d Session, March 27, 1910, at page 2, sets out the types of injuries the FELA was enacted to redress.[13]

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[11] Employees sometimes stay out so as to increase an FELA recovery. A report filed by Amtrak indicated that two years after one accident only one employee out of eleven returned to work and in a minor derailment in which *no* passengers were injured all fifteen employees claimed injury and had not returned to work. *Baker, supra,* at 103. Indeed, the trend was towards employees not returning. *Id.*

[12] The FELA is a federal negligence statute that applies to the railroad industry. 45 U.S.C. §§ 51-60. Liability is not absolute. *Brady v. Southern Ry.*, 320 U.S. 476, 483-84 (1943); *Baltimore & Ohio R.R. v. Inman,* 361 U.S. 138, 140 (1959). It has been well established under the FELA that an employee could not recover by merely proving that the work involved was difficult or inconvenient. An employee had to prove that the railroad was negligent. The basis of the railroad's liability under the FELA is negligence, *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32-33, *reh'g. denied,* 321 U.S. 802 (1944), not the mere fact that an injury may have occurred to its employee. *Ellis v. Union Pacific R.R.*, 329 U.S. 649, 653 (1947); *Chicago, R.R. & P.R.R. Co. v. Lint,* 217 F.2d 279, 281 (8th Cir. 1954); *Igsett v. Seaboard Coast Line R.R.*, 332 F. Supp. 1127 (D.S.C. 1971).

[13] There is a current debate on whether or not the railroad industry remains as dangerous as when the FELA was enacted. Babcock and Oldfather, The Role of the Federal Employers' Liability Act in Railroad Safety, 19 Transp. L. J. 881 (1990-1991) Notably,

> This subject is referred to here only for the purpose of calling upon Congress to make entirely manifest the good faith of the legislature in the enactment of the employers' liability law, which places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the *lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling.* The total casualties to train men on the interstate railroads of the United States for the year 1908 was 281,645. *It was the intention of Congress in the enactment of this law originally, and it may be presumed to be in the intention of the present Congress to shift the burden of the loss resulting from these casualties* from "those least able to bear it," and place it upon those who can, as the Supreme Court said in the *Taylor* case, "measurably control their losses."

(emphasis added).

It is clear that Congress neither intended nor anticipated that the Act would provide relief for non-physical or solely *stress induced* injuries. Congress spoke only to physical injuries. Justice Douglas, concurring in *Wilkerson v. McCarthy,* 336 U.S. 53, 68, *reh'g denied,* 336 U.S. 940 (1949), best described the intent of Congress on this point when he said, "[t]he Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." We cannot assume that Congress *sub silentio* intended the FELA to provide

coverage for wholly *stress induced* injuries. *See Monessen Southwestern Ry. v. Morgan,* 486 U.S. 330, 337-39 (1988) (Congress's silence on issue of prejudgment interest under FELA indicates its intent not to permit recovery of such interest). Congress has never attempted, then or now to amend the FELA to provide coverage for wholly *stress induced* injuries.[14]

The courts have long acknowledged that the FELA was designed to protect railroad employees who are physically injured or killed at work. Furthermore, the courts have uniformly upheld the intent of Congress that there can be no recovery for emotional distress under the FELA without some precipitating physical injury. *See Adkins v. Seaboard System R.R.,* 821 F.2d 340, 341-42 (6th Cir.), *cert. denied,* 484 U.S. 963 (1987); *Antalek v. Norfolk & Western Ry.,* No. 82-427 (N.D. Ohio 1983), *aff'd,* 742 F.2d 1454 (6th Cir. 1984); *Bullard v. Central Vermont Ry., Inc.,* 565 F.2d 193, 197 (1st Cir. 1977); *Finn v. Consolidated Rail Corp.,* 622 F. Supp. 41, 43 (D. Mass. 1985), *aff'd on other grounds,* 782 F.2d 13 (1st Cir. 1986); *Lancaster v. Norfolk & Western Ry. Co.,* 773 F.2d 807, 813 (7th Cir. 1985), *cert. denied,* 480 U.S. 945 (1987); *McSorley v. Consolidated Rail Corp.,* 581 F. Supp. 642, 645 (S.D.N.Y. 1984).

In *Lancaster, supra,* 773 F.2d at 813, the Seventh Circuit thoroughly reviewed the Act's history and federal

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NOTES *(Continued)*

50% of the injuries under FELA were sprains and strains. In 1988, there were 64 amputations and 1,289 fractures. The fractures presumably included fingers and toes. The construction, mining, and manufacturing industries had higher amputations rates and the mining and construction industries had a higher fracture rate. *See,* D. Saphine, *FELA and Rail Safety: A Response to Babcock and Oldfather – The Role of the Federal Employers' Liability Act in Railroad Safety,* 19 Transp. L.J. 901 (1990-1991).

[14] Congress has amended the FELA on several occasions since 1908. In 1910, Congress amended the FELA to allow concurrent state and federal jurisdiction. The amendment also expanded the venue provisions to allow an employee to file suit in any jurisdiction where the defendant resided, or did business, or where the cause of action arose. 36 Stat. 291 (1910), codified at 45 U.S.C. §56. In 1939, Congress eliminated the assumption of risk defense for all cases, extended the limitation period to three years, and added provisions to prevent interference with any person attempting to provide information on a FELA claim. 53 Stat. 1404 (1939), codified at 45 U.S.C. §§54, 56, 60. Therefore, if wholly *stress induced* injuries are to be actionable under the FELA, then like prejudgment interest, "Congress must expressly so provide." *Monessen, supra,* 486 U.S. at 339.

common law on the issue and determined that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact" because the Act addresses "the security of the person from physical invasions." The *Lancaster* ruling was based on a careful consideration of existing federal common law under which no cases allowed FELA recovery for mental injury where the "physical dimension" was lacking. *Id.* Thus, under *Lancaster*, a claim of intentional infliction of emotional distress is not actionable absent allegations of assault or battery, and a claim for negligent infliction of emotional distress is not actionable unless it is a "physical" tort, that is, unless it involves actual or threatened physical contact.

In *Atchison, supra*, 480 U.S. at 557, this Court declined the opportunity to hold that a claim for emotional distress can be made absent physical injury. Indeed, this Court noted that the majority of states required physical contact or the claimant to be in a zone of danger. The physical impact test, in other words, has support in the legislative history and judicial precedent. The test also has the advantage that it can be applied with ease and predictability.[15]

D. If The Court Does Not Accept The Physical Impact Test Then The Zone Of Danger Test Should Be Adopted

If SEPTA's suggested test of physical impact is not adopted, then Conrail's zone of danger test should be accepted. Several states have allowed recovery for claims of negligent infliction of emotional distress as a result of

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[15] Of course, the test may preclude recovery in certain extreme instances and award damages for a minor impact in other less sympathetic cases. However, no test is free of some arbitrary limits. *See, e.g.*, Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. Fla. L. Rev. 333, 337 (1984) (discussing the lengths that courts have gone to in order to find an "impact".)

being placed in a zone of danger. The zone of danger test can also be applied in a concrete and consistent fashion. The test is limited to those who are placed in imminent risk of physical harm and does not expand the zone to those who are foreseeably at risk for emotional harm. *See* Restatement of (Second) of Torts §436 (1965). The cases that have specifically applied the zone of danger concept to the FELA have uniformly adopted the following principles: (1) the individual must have been in a zone of danger (high risk of physical injury from defendant's negligent act); (2) the individual must have felt contemporaneous fear for his safety; and (3) the individual must show some physical injury or illness as a result of his emotional distress. *Gillman v. Burlington N.R.R. Co.*, 673 F. Supp. 913, 917 (N.D. Ill. 1987), *aff'd.*, 878 F.2d 1020 (7th Cir. 1989); *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3rd Cir. 1991); *Angst v. Great Northern Ry.*, 131 F. Supp. 156 (D. Minn. 1955); *Gaston v. Flowers Transp.*, 675 F.Supp 1036 (E.D.La. 1987), *aff'd*, 866 F.2d 816 (5th Cir. 1989).

The experience of the common law precedent clearly demonstrates that a zone of danger test is workable. Tests that involve an assessment of the foreseeability of emotional injury ultimately expand towards unlimited liability because there will always be expanding arguments for foreseeability. In contrast, by restricting recovery for emotional injury to those people who experience or are threatened with physical impact, a defendant's potential liability will be limited. Summary judgment motions can be filed and litigation avoided. Valid claims will be paid, and the scope of recovery will be in accordance with the law for common law claims of emotional distress.

CONCLUSION

The FELA does not require a railroad to be an insurer of its employees' emotional health but the foreseeability standard does. Further, the FELA was not enacted to allow an employee to recover for job related stress due to the performance of the duties required to be performed. In contrast, the foreseeability standard adopted in *Gottshall* and *Carlisle* imposes liability for every day working conditions. The foreseeability standard is in actuality a non-standard and will result in the trial of every stress claim. This will increase the workload and costs to an already burdened court system. Moreover, it will increase cost to operators of the rail system, their passengers and, in many instances, to the taxpayers of state-run transit systems. The adoption of standard requiring physical impact or a threat of physical impact is consistent with policies of the FELA and the law of negligence followed in the majority of states. Further, these standards will provide guidance to the courts, their employers and ensure the payment of valid claims.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents

BRIEF ON BEHALF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

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Respondents

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

Southeastern Pennsylvania Transportation Authority ("SEPTA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused.

SEPTA is a statutorily-created government agency which operates a mass transit system in the Philadelphia Metropolitan area. SEPTA also provides commuter rail lines and, therefore, is subject to the Federal Employer's

Liability Act, 45 U.S.C. §§51-60. (FELA) SEPTA has approximately 1,500 workers who are covered by FELA.

Under Pennsylvania law, negligence claims brought against SEPTA – a Commonwealth agency – are limited to the exceptions set forth in the Sovereign Immunity Act. 42 Pa. C.S.A. §8501, et seq. SEPTA has a limitation on damages under its immunity statute for tort actions, however, there is no limitation on damages under the FELA. The interest of SEPTA arises from the fact that the case will have an impact on its claims budget, as well as its operating budget. The decision will increase the cost of litigation and the payment for FELA claims. SEPTA, like many government agencies, has budgetary problems. An increase in the FELA payment will divert limited resources. Any budgetary shortfalls due to an increase in FELA payments would have to be sought through local, state or federal funding sources or an increase in the fare box.

The policy considerations for placing limitations on emotional distress claims were not fully explored by the Third Circuit. SEPTA believes that the policy concerns will not be addressed in the petitioner's brief. Therefore, this amicus brief will aid the Court in addressing the policy issues underlying the need for limitations on claims for emotional stress.

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BRIEF ON BEHALF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

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PARTY TO PROCEEDING

Amicus Curiae Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA") is a statutorily-created Pennsylvania Commonwealth agency, which operates a mass transit system in the Philadelphia Metropolitan area. SEPTA provides bus, trolley, subway-elevated and commuter rail services. Because SEPTA operates certain commuter rail lines, it is subject to the Federal Employers' Liability Act (hereinafter "FELA"), 45 U.S.C. §§51-60.

Under Pennsylvania law, negligence claims brought against SEPTA – a Commonwealth agency – are limited to the exceptions set forth in Pennsylvania's Sovereign Immunity Statute. 42 Pa. C.S.A. § 8501, *et seq.* Because it is a Commonwealth agency, subject to the FELA, it is not necessary for SEPTA to file a petition for leave to file an amicus brief.

SUMMARY OF ARGUMENT

Amicus SEPTA respectfully suggests that the test of "foreseeability" enunciated by the Third Circuit in the instant cases provides employers, their counsel and other litigants with virtually no meaningful guidance on what constitutes a claim for emotional distress under the FELA. The fact is that railworkers are from time to time subject to working conditions that are actually dangerous, to say nothing of "stressful". The risk of *physical harm* to such a worker on account of such circumstances is recognized and, at least to a degree, definable. But there is no limit, at all, on the number of people who might suffer – or claim to suffer – some emotional injury arising out of *stress.* Everyone can claim to be affected by stress. Indeed, as a practical matter, the Third Circuit's formulation precludes virtually all successful summary judgment motions and every claim must be tried. The increased costs – in judgments, settlements and lawyers' fees — are likely to be substantial and will be very damaging to an agency, like SEPTA, with a limited budget and continuing capital needs.

Given the obvious problems presented by the Third Circuit's standard, SEPTA urges this Court to adopt a different formula that will provide standards by which an employer can assess liability. Such a standard would be consistent with the limitations imposed by other Courts of Appeal. SEPTA suggests that test should be a "physical impact" standard. Alternatively, SEPTA suggests that the "zone of danger" test, as enunciated by Conrail, be accepted. Both rules result in payment of claims that are most likely to be genuine because emotional harm inflicted when there is an impact or in the setting of a "near miss" is much more likely to be real than alleged emotional harm to a person merely witnessing an event or far-removed from the scene of an injury. Finally, either the impact or zone of danger rules can be applied with certainty and will avoid the necessity of conducting a trial in every case.

ARGUMENT

A. The Third Circuit Has Failed To Provide Any Guidance With Regard To Limitations On Claims For Emotional Distress Under the FELA

Prior to the decision in *Gottshall v. Consolidated Rail Corp.*, 998 F.2d 335 (3rd Cir. 1993), a plaintiff could not recover for emotional injury that did not result from a physical impact, or at least the threat of such impact. *See, e.g., Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3rd Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 970 (1991). The Court of Appeals for the Third Circuit has now radically departed from its prior rule. In order to compensate an admittedly sympathetic plaintiff, the Court has effectively eliminated any workable limitation on claims for emotional distress. In so doing, it has permitted bad facts to make bad law.

Gottshall does not provide the trial courts with useful instructions on how they are to determine whether a given injury is of a type appropriately compensated under the FELA While ostensibly applying the traditional common law tort requirements of breach of duty, causation, foreseeability and injury, the court has for all practical purposes left the decision to be resolved by *ad hoc* determinations by different judges as to whether a given emotional condition is or is not "foreseeable." Indeed, in *Gottshall*, the court never even identified the negligent conduct at issue, suggesting only that emotional distress might be foreseen in the case of witnessing the death of a friend. In fact, however, the damages claimed by Gottshall did not arise solely from his witnessing a friend's death: Gottshall's complaint was really about the working condition for the entire track gang.

After *Gottshall*, in *Consolidated Rail v. Carlisle*, 990 F.2d 90 (3rd Cir. 1993), the Third Circuit went further allowing a stress related claim where the only duties to be performed were those of a dispatcher. *Carlisle* severed all ties to the common law and abandoned any meaningful analysis of the character of the employer's tortious activity. It now appears that there need be no incident that causes physical impact or the threat of physical impact; there need be no incident that could be characterized as outrageous or unconscionable; there need be no incident during which a plaintiff witnesses a distressful event. Indeed, there need be no incident at all. Rather, the Third Circuit has ruled that general work conditions that create stress can be the basis for liability for emotional injury under the FELA *Carlisle*, 990 F.2d at 97. After all, the "tortious acts" that gave rise to liability in *Carlisle* were: reducing the work force; requiring employees to work longer hours; and failing to upgrade railstock and switching equipment. *Id.* at 92. Therefore, according to the Third Circuit, "tortious activity" can include business and management decisions that, in the aggregate, cause stress to certain workers.

Contrary to this Court's instruction in *Atchison, Topeka & Sante Fe Ry. Co. v. Buell*, 480 U.S. 557, 568 (1987), that courts must consider both "the nature of the injury and the character of the tortious activity," the Third Circuit omitted an analysis of the character of the employer's tortious activity and focused solely on the nature of the plaintiff's injury. The Third Circuit reasoned that as long as the plaintiff can prove that his emotional injury is genuine, the FELA provides a remedy. *Carlisle*, 990 F.2d at 94. The Third Circuit adopted no single standard for weighing the "genuineness of emotional injury claims". *Id.* at 98. Rather, the Third Circuit suggested that indicia of the genuineness of the claim should be assessed by applying traditional negligence elements of duty, foreseeability, breach and causation. If this is the only guidance, however, the courts are left with no meaningful guidance as to what will be a valid claim and all cases must be tried. In contrast to the Third Circuit, most courts examining these common law concepts have raised legitimate concerns about the dangers associated with the claims for emotional distress and sought to place definable guidelines for recovery.

B. The Third Circuit Has Discarded All The Limitations Articulated By The Courts For Placing Restrictions On Emotional Distress Claims

Indeed, the Third Circuit has ignored the concerns voiced by most courts in attempting to place limits on claims for emotional distress. The principle concerns are: (1) unlimited liability; (2) the increase of litigation and fraudulent claims, and (3) the need for predictability. *See* Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 Wash. L. Rev. 1 (1992).

The concern for exposing defendants to potentially unlimited liability, and thereby placing too onerus a

burden on defendants' beneficial activity, has been the most lasting policy limitation for mental distress claims. As Dean Prosser stated:

> There is still the problem of an end to liability, of a place to stop. It is still unthinkable that any one shall be liable to the end of time for all of the results that follow in endless sequence from his single act. Causation cannot be the answer; in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world. Any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts, which would set society on edge and fill the courts with endless litigation.

Prosser, *Palsgraff Revisited*, 52 Mich. L. Rev. 1, 32 (1953).

But if liability for emotional distress is based solely upon foreseeability, then an employer's exposure really is unlimited. As one court pointed out, for example, every individual who saw the television coverage during The Challenger space shuttle disaster was subjected to emotional distress. *See Hinojosa v. South Texas Drilling and Exploration, Inc.*, 727 S.W.2d 320, 324 (Tex. App. 1987). For every such individual present at the location or watching television, the emotional distress was certainly foreseeable. Surely all of these millions of individuals were not suddenly afforded a cause of action. Similarly, in the case of *Gottshall*, all the track workers who were present could claim they suffered stress-related symptoms from overwork on the day in question or even upon learning about the death of a fellow track worker. Likewise, these track workers could file a claim upon learning of Mr. Gottshall's claimed injuries. Other track workers at other locations working under similar conditions could also claim they heard about the incident and then they suffered emotional distress. What the court has set the stage for is an unlimited domino effect.

Moreover, a claim for *negligent* infliction of emotional distress does not limit recovery for the intentional acts of the defendant, but rather seeks recovery for mere negligence or "carelessness." But carelessly imposed emotional harm is unavoidable in our society, and it occurs in a wide variety of situations. As the California Supreme Court has put it, "[t]he overwhelming majority of 'emotional distress' which we endure . . . is not compensable." *Thing v. LaChusa*, 48 Cal. 3d 644, 667, 771 P.2d 814, 829 (1989). Even overtime or additional effort due to a major project, under *Carlisle,* could produce claims. Increased work hours due to a reduction in force, a mistake in scheduling, or sickness of co-workers can be characterized as negligent. This characterization must be resolved only by a full-scale jury trial because there would be no legally enforceable limit that would justify a dismissal or grant of summary judgment.

This leads to the second concern – increased litigation. Any suggestion that litigation will do anything other than increase[1] does not take into account the realities of litigation or the difficulty in dealing with a psychiatric claim.[2] The basis of all psychiatric diagnosis is primarily the litigant/patient. Inherently, reliability is suspect. Emotional distress claims will be the soft-tissue injury case of the 1990's. Claims of injury in both types of cases are purely subjective and damages must be proven by expert testimony. In emotional distress claims the expert diagnosis is not as simplistic as the diagnosis of compression fracture at the fourth lumbar vertebra.

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[1] Railroad employment has decreased by 40% in the last decade (1980: 475,930 to 1989: 261,063). Reportable injuries have decreased 60% (1980: 56,428 to 1989: 22,322). However, the FELA payout has increased 130% over the same period. (1980: $343 million to 1989: $789 million). See Baker, *Why Congress Should Repeal The Federal Employer's Liability Act of 1908*, 29 Harv. J. of Legis. 79, 104 (1992)

[2] There is frequently a correlation between the litigation and continuing claims of distress. *See* Melton, Petrila, Paytress & Slobojin, *Psychological Evaluations for the Courts* 283 (1987).

Such a diagnosis involves biological or mechanical tests that would be performed by one orthopedic doctor to the next with a high degree of specificity. *See* Crump, *Evaluating Independent Torts Based Upon Intentional or "Negligent" Inflicting of Emotional Distress. How Can We Keep the Baby from Dissolving in the Bath Water?,* 34 Ariz. L. Rev. 446, n.216 (1992). But a diagnosis of borderline personality disorder, post-traumatic stress disorder, or chronic undifferentiated schizophrenia will not be physically verifiable and requires both interpretation and subjective weighing of multiple simultaneous criteria. Moreover, the diagnostic criteria for psychological disorders usually concern manifestations that also are present in all mentally-healthy persons. Thus, the obsessive-compulsive personality disorder is diagnosed by criteria that are present in some classes of healthy people to a marked degree (e.g., lawyers). American Psychiatric Assn, Quick Reference to the Diagnostic Criteria From DSM- III-R 194-95, 146-48, 113-18 (1987) (summarizing criteria, such as "perfectionism," "preoccupation with details [and] rules," "excessive devotion to work," "overconscientiousness," and "restricted expression of affection" that are virtual survival characteristics for lawyers in high-pressure practices).[3] *Id.* at 199-200.

The point is that the manipulability of diagnostic criteria in psychiatry is of a much greater order of magnitude than dealing with objective physical symptoms.[4] *See also* Alexander D. Brooks, *Law, Psychiatry and the Mental Health System,* chs. 1-3 (1974) (describing psychiatry as it relates to law, as it defines mental illness, and as a behavioral science). There will always be a psychiatrist to testify for the plaintiff. Indeed, expanding recovery for emotional distress will result in a cottage industry for psychiatrists who will testify on behalf of plaintiffs or defendants.[5] As one commentator stated:

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[3] With a physical injury surveillance can be utilized to flush out fraudulent claims. *See* "Carribean Breezes Do Wonders for Injured Worker," *Corp. Legal Times,* Sept. 1993, at 44. In a psychiatric claim the effectiveness of surveillance is limited.

[4] Further, in FELA claims, a claims attorney works on a contingency of 30-40%, therefore, there is an incentive to buildup the damages and, therefore, the treatment. *See* Herde, *FELA: Should It Be Abolished?,* 17 Forum 407 (1981).

> Psychiatrists agree in a much smaller percentage of diagnoses than most other kinds of health-related professionals. Diagnostic criteria are numerous, diffuse and extraordinarily malleable. Accordingly, diagnoses of psychic injuries are subject to ready manipulation by partisan witnesses. Although the same sort of partisan cottage industries exist in a wide variety of other cases (at great cost) the manipulation of the resulting psychiatric evidence could be expected vastly to exceed the distortions in most other cases.
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> These disadvantages might be tolerable if liability were confined to the kind of outrageous conduct involved in the tort of intentional infliction of severe emotional distress. But when the underlying tort itself is unbounded, as the negligent infliction tort is, the danger arises that a skillful, motivated attorney can contrive very large damages for conduct not really demarcated as culpable.[6]

Crump, supra, at 475.

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[5] For an example of the partisan view of experts, *see* William A. Barton, *Recovering from Psychological Injuries* (1985). This publication by the American Trial Lawyers Association begins, "This is a plaintiff's cookbook filled with proven recipes. . . ." *Id.* at ch. XV, 6. Further, a book informing railroad workers of their rights suggests that they answer as little as possible about an accident. *See,* John H. Blount & J. Edward Dvorak, III, *Justice for the Injured Railroad Worker (And How to Achieve It)* 3-5 (1987). Obviously, after consulting with an attorney or union representative the accident report can be phrased in a way to establish the railroad's negligence.

[6] *See* Platt & Husband, *Post-Traumatic Stress Disorder in Forensic Practice,* 4 Am. J. Forensic Psychology 29 (1986). These authors describe this phenonemon, which they term "role enactment" as a process in which the litigant picks up subtle clues from

Further, reduction of everything to a "foreseeability" test will never permit a summary judgment motion and will result in increased jury trials and increased costs. Even learned judges disagree on what is foreseeable. The difficulty with the foreseeability standard is highlighted by the case of *Plaisance v. Texaco, Inc.,* 937 F.2d 1004 (5th Cir. 1991), *rehearing granted,* 954 F.2d 266 (1992), *opinion upon rehearing,* 966 F.2d 166 (5th Cir. 1992) (en banc), *cert. denied,* ___U.S. ___, 113 S.Ct. 604 (1992). The plaintiff, a seaman, claimed psychic injury from merely seeing an explosion and fire that neither caused nor threatened injury to anyone. A claim was brought under the Jones Act, an act covering Maritime employees, and its underlying statutory structure, the FELA. *Id.* at 1006. His psychiatrist diagnosed post-traumatic stress disorder, a diagnosis that the Fifth Circuit panel described as "baffl[ing]". 937 F.2d at 1011. The Fifth Circuit, addressing the issue of "foreseeability" held that the injury was not a reasonably foreseeable consequence for an experienced seaman. The entire Fifth Circuit then undertook *en banc* review of *Plaisance* on its own motion. The *en banc* court ultimately rejected full recovery for negligently inflicted emotional distress in the FELA context. It cited a

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the attorneys or treating professionals as to the symptoms they might be expected to have. *Id.* at 35. The questions and messages communicated by the professionals may have the effect of covertly influencing the litigant to report additional symptoms, or may reinforce the degree and severity of existing symptoms. This process may be conscious or unconscious. *Id. See also* Simon & Zusman, *The Effect of Contextual Factors on Psychiatrists' Perception of Illness: A Case Study,* 24 J. Health & Soc. Behav. 186 (June 1983). These authors discovered empirically that mental health experts' diagnostic and prognostic decisions correlated highly with the practitioner's forensic position (whether the expert worked for the plaintiff or defendant). *Id.* at 191. For a further discussion, *see* Comment, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress,* 33 Vill. L. Rev. 781, 817-23 (1988).

previous decision, *Gaston v. Flowers Transp.*, 675 F.Supp. 1036 (E.D.La. 1987), *aff'd*, 866 F.2d 816 (5th Cir. 1989), in which a panel of the court had discussed the policy reasons for rejecting a negligently inflicted emotional distress claim: "potentially ruinous liability", "feigned injuries and bogus claims", "exponential damages awarded" in a "random and wayward fashion", and "the difficulty of insuring excessive levels of unpredictable liability." 866 F.2d at 820. The facts of the *Plaisance* case are themselves a strong argument against the negligent-infliction tort: the necessity of three different levels of review to decide *Plaisance* – district court, appellate panel, and *en banc* court-demonstrates the disproportionate costs, manipulable damages, and difficulty of screening out unmeritorious claims that would result if the negligent-infliction tort were recognized in a FELA context.[7] If the test utilized was an impact test, a zone of danger test, or even a bystander test, then summary judgment could have been granted since *Plaisance* could not meet any of these standards. Plaisance suffered no impact, was not in a zone of danger (since another boat was on fire) and there were no injuries to a close relative.

The foreseeability test will result in an increased number of trials. Individuals will not know with certainty if they have a valid claim and employers will not know whether they are liable until all appeals have been exhausted. The Third Circuit's opening of the floodgates not only results in increased costs to employers but also to the court system.[8]

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[7] Even in *Gottshall* there was a split of opinion as to foreseeability. Judge Roth dissented on the grounds that any duty violated was to the decedent and not to Gottshall. Judge Roth stated, "the impact on James Gottshall of any negligence on the part of Conrail could not have been reasonably foreseeable." 988 F.2d at 384.

[8] Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 507-08 (1982); A.B.A., Report of the Action Commission to Improve The Tort Liability System – 1987. Recommendations have been made to repeal the FELA due to increased burdens on the court system. *See* Baker, *supra note* 1, at 87-89.

Because every rail employee is likely to experience some degree of emotional distress, adoption of the position espoused by the Third Circuit would bring every allegation of a headache or disenchantment-induced stress suffered by a rail employee within the province of the FELA. Disagreements between supervisors and subordinates about the workload and/or conditions in the work place exist in every place of employment. Under the Third Circuit standard, a railroad employee has ready access to a jury trial in federal or state court. A railroad employee is no more susceptible to the mental distress that may result in connection with workplace disagreements or stresses than any employee in any other industry. Moreover, other workers are subject to workmen's compensation statutes, which impose limitations on their recoveries for work-related stress.[9] The

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[9] Significantly, an employee in Pennsylvania who sues for physical injuries suffered as a result of psychological stimulus must prove that the symptoms are "physical injuries" and not simply that the symptoms are merely a manifestation of stress. There must be long lasting physical injury once the cause of mental anguish has been eliminated. *See, e.g., Whiteside v. Unisys Corp.*, W.C.A.B. – A92-1824 (Sept. 30, 1993). Further, the conditions must be abnormal. *See. Calabris v. W.C.A.B.*, 141 Pa. Commw. 405, 595 A.2d 765 (1991). In states which have liberal standards for stress-related workmen's compensation claims, such as Michigan, there is a movement for legislative reform. Comment, *Can I Collect Worker's Compensation Benefits If My Job Drives Me Crazy?*, 2 Det. Coll. L. Rev. 591 (1992); "Reading This May Cause You Stress," *Bus. Week*, Oct. 14, 1985 at 170 reads as follows:

> Most business and professional people insist, usually with pride, that they work under pressure that would fracture lesser mortals. Yuppies in particular regard stressful jobs as status symbols. But not everybody is a yuppie, and more and more employees are saying that they cannot stand up under the stress of their jobs. Some of them are demanding – and getting – hefty payments from employers who subject them to what a court or compensation board thinks is unfair stress.
>
> Figuring out what constitutes unfair stress must be pretty

court noted in *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073, 1090 (E.D. Pa. 1989), *appeal dismissed*, 899 F.2d 1360 (3rd Cir. 1990):

> [P]laintiffs, who allegedly suffer from stress-related physical or purely emotional injuries or illnesses caused by their general working conditions, fail to state a claim under the FELA. Lawyers, doctors, bus drivers, police officers, laborers, and yes, even judges, face stressful conditions every working day. To suggest that Congress intended to single out railroad workers (and seamen under the Jones Act) as worthy of special protection from such stress would be pure folly. Job-related stress is simply not the type of problem intended to be dealt with by the FELA.

Permitting FELA claims for wholly mental injuries will inhibit the exercise of management prerogative and the smooth operation of the nation's railroads.[10] Railroad

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NOTES *(Continued)*

stressful itself. At least it is leading to some rather peculiar outcomes. The Kentucky Workers' Compensation Board awarded Gary Pearl, a white sanitation worker in Louisville, maximum benefits and a job change because he could not endure the stress of working with blacks. A woman won an award because she suffered a nervous breakdown when her employer told her she was being transferred.

Let's all keep calm and ask quietly: What in heaven's name is going on here? Will employers have to redesign jobs to eliminate stress? Stress is an elusive phenomenon, determined by motivations and incentives. My stress may be your challenge. What will happen when to already lagging U.S. productivity, to the struggle to compete with Japan and other countries, if people who can't cope with stress in their jobs are rewarded with resources produced by people who can? It may be too much to expect judges and compensation boards to ponder such issues. But the rest of us should.

[10] Both plaintiffs in *Gottshall* and *Carlisle* had disputes concerning their working conditions which could have been resolved through the grievance mechanism in place in their collective bargaining agreement.

employers should not have to confront the prospect of FELA litigation absent actual or threatened physical contact[11] which the statute was intended to redress. Such a result is at odds with the FELA's legislative intent and public policy.[12]

C. Congress Did Not Intend To Provide Recovery For Emotional Distress Under the FELA in the Absence of Some Precipitating Physical Injury

The Third Circuit's new rule goes well beyond what Congress intended when it passed the FELA. The types of injuries that Congress intended to cover are described in the Act's legislative history. Senate Report No. 432, 61st Congress, 2d Session, March 27, 1910, at page 2, sets out the types of injuries the FELA was enacted to redress.[13]

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[11] Employees sometimes stay out so as to increase an FELA recovery. A report filed by Amtrak indicated that two years after one accident only one employee out of eleven returned to work and in a minor derailment in which *no* passengers were injured all fifteen employees claimed injury and had not returned to work. *Baker, supra,* at 103. Indeed, the trend was towards employees not returning. *Id.*

[12] The FELA is a federal negligence statute that applies to the railroad industry. 45 U.S.C. §§ 51-60. Liability is not absolute. *Brady v. Southern Ry.*, 320 U.S. 476, 483-84 (1943); *Baltimore & Ohio R.R. v. Inman*, 361 U.S. 138, 140 (1959). It has been well established under the FELA that an employee could not recover by merely proving that the work involved was difficult or inconvenient. An employee had to prove that the railroad was negligent. The basis of the railroad's liability under the FELA is negligence, *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32-33, *reh'g. denied*, 321 U.S. 802 (1944), not the mere fact that an injury may have occurred to its employee. *Ellis v. Union Pacific R.R.*, 329 U.S. 649, 653 (1947); *Chicago, R.R. & P.R.R. Co. v. Lint*, 217 F.2d 279, 281 (8th Cir. 1954); *Igsett v. Seaboard Coast Line R.R.*, 332 F. Supp. 1127 (D.S.C. 1971).

[13] There is a current debate on whether or not the railroad industry remains as dangerous as when the FELA was enacted. Babcock and Oldfather, The Role of the Federal Employers' Liability Act in Railroad Safety, 19 Transp. L. J. 881 (1990-1991) Notably,

> This subject is referred to here only for the purpose of calling upon Congress to make entirely manifest the good faith of the legislature in the enactment of the employers' liability law, which places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the *lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling.* The total casualties to train men on the interstate railroads of the United States for the year 1908 was 281,645. *It was the intention of Congress in the enactment of this law originally, and it may be presumed to be in the intention of the present Congress to shift the burden of the loss resulting from these casualties* from "those least able to bear it," and place it upon those who can, as the Supreme Court said in the *Taylor* case, "measurably control their losses."

(emphasis added).

It is clear that Congress neither intended nor anticipated that the Act would provide relief for non-physical or solely *stress induced* injuries. Congress spoke only to physical injuries. Justice Douglas, concurring in *Wilkerson v. McCarthy*, 336 U.S. 53, 68, *reh'g denied*, 336 U.S. 940 (1949), best described the intent of Congress on this point when he said, "[t]he Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." We cannot assume that Congress *sub silentio* intended the FELA to provide

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NOTES *(Continued)*

50% of the injuries under FELA were sprains and strains. In 1988, there were 64 amputations and 1,289 fractures. The fractures presumably included fingers and toes. The construction, mining, and manufacturing industries had higher amputations rates and the mining and construction industries had a higher fracture rate. *See*, D. Saphine, *FELA and Rail Safety: A Response to Babcock and Oldfather – The Role of the Federal Employers' Liability Act in Railroad Safety*, 19 Transp. L.J. 901 (1990-1991).

coverage for wholly *stress induced* injuries. *See Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 337-39 (1988) (Congress's silence on issue of prejudgment interest under FELA indicates its intent not to permit recovery of such interest). Congress has never attempted, then or now to amend the FELA to provide coverage for wholly *stress induced* injuries.[14]

The courts have long acknowledged that the FELA was designed to protect railroad employees who are physically injured or killed at work. Furthermore, the courts have uniformly upheld the intent of Congress that there can be no recovery for emotional distress under the FELA without some precipitating physical injury. *See Adkins v. Seaboard System R.R.*, 821 F.2d 340, 341-42 (6th Cir.), *cert. denied*, 484 U.S. 963 (1987); *Antalek v. Norfolk & Western Ry.*, No. 82-427 (N.D. Ohio 1983), *aff'd*, 742 F.2d 1454 (6th Cir. 1984); *Bullard v. Central Vermont Ry., Inc.*, 565 F.2d 193, 197 (1st Cir. 1977); *Finn v. Consolidated Rail Corp.*, 622 F. Supp. 41, 43 (D. Mass. 1985), *aff'd on other grounds*, 782 F.2d 13 (1st Cir. 1986); *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987); *McSorley v. Consolidated Rail Corp.*, 581 F. Supp. 642, 645 (S.D.N.Y. 1984).

In *Lancaster, supra*, 773 F.2d at 813, the Seventh Circuit thoroughly reviewed the Act's history and federal common law on the issue and determined that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact" because the Act addresses "the security of the person from physical invasions." The *Lancaster* ruling was based on a careful consideration of existing federal common law under which no cases allowed FELA recovery for mental injury where the "physical dimension" was lacking. *Id.* Thus, under *Lancaster*, a claim of intentional infliction of emotional distress is not actionable absent allegations of assault or battery, and a claim for negligent infliction of emotional distress is not actionable unless it is a "physical" tort, that is, unless it involves actual or threatened physical contact.

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[14] Congress has amended the FELA on several occasions since 1908. In 1910, Congress amended the FELA to allow concurrent state and federal jurisdiction. The amendment also expanded the venue provisions to allow an employee to file suit in any jurisdiction where the defendant resided, or did business, or where the cause of action arose. 36 Stat. 291 (1910), codified at 45 U.S.C. §56. In 1939, Congress eliminated the assumption of risk defense for all cases, extended the limitation period to three years, and added provisions to prevent interference with any person attempting to provide information on a FELA claim. 53 Stat. 1404 (1939), codified at 45 U.S.C. §§54, 56, 60. Therefore, if wholly *stress induced* injuries are to be actionable under the FELA, then like prejudgment interest, "Congress must expressly so provide." *Monessen, supra*, 486 U.S. at 339.

In *Atchison, supra,* 480 U.S. at 557, this Court declined the opportunity to hold that a claim for emotional distress can be made absent physical injury. Indeed, this Court noted that the majority of states required physical contact or the claimant to be in a zone of danger. The physical impact test, in other words, has support in the legislative history and judicial precedent. The test also has the advantage that it can be applied with ease and predictability.[15]

D. If The Court Does Not Accept The Physical Impact Test Then The Zone Of Danger Test Should Be Adopted

If SEPTA's suggested test of physical impact is not adopted, then Conrail's zone of danger test should be accepted. Several states have allowed recovery for claims of negligent infliction of emotional distress as a result of being placed in a zone of danger. The zone of danger test can also be applied in a concrete and consistent fashion. The test is limited to those who are placed in imminent risk of physical harm and does not expand the zone to those who are foreseeably at risk for emotional harm. *See* Restatement of (Second) of Torts §436 (1965). The cases that have specifically applied the zone of danger concept to the FELA have uniformly adopted the following principles: (1) the individual must have been in a zone of danger (high risk of physical injury from defendant's negligent act); (2) the individual must have felt contemporaneous fear for his safety; and (3) the individual must show some physical injury or illness as a result of his emotional distress. *Gillman v. Burlington N.R.R. Co.,* 673 F. Supp. 913, 917 (N.D. Ill. 1987), *aff'd.,* 878 F.2d 1020 (7th Cir. 1989); *Outten v. National R.R. Passenger Corp.,* 928 F.2d 74 (3rd Cir. 1991); *Angst v. Great Northern Ry.*, 131 F. Supp. 156 (D. Minn. 1955); *Gaston v. Flowers Transp.,* 675 F.Supp 1036 (E.D.La. 1987), *aff'd,* 866 F.2d 816 (5th Cir. 1989).

The experience of the common law precedent clearly demonstrates that a zone of danger test is workable. Tests that involve an assessment of the foreseeability of emotional injury ultimately expand towards unlimited liability because there will always be expanding arguments for foreseeability. In contrast, by restricting recovery for emotional injury to those people who experience or are threatened with physical impact, a defendant's potential liability will be limited. Summary judgment motions can be filed and litigation avoided. Valid claims will be paid, and the scope of recovery will be in accordance with the law for common law claims of emotional distress.

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[15] Of course, the test may preclude recovery in certain extreme instances and award damages for a minor impact in other less sympathetic cases. However, no test is free of some arbitrary limits. *See, e.g.,* Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury,* 36 U. Fla. L. Rev. 333, 337 (1984) (discussing the lengths that courts have gone to in order to find an "impact".)

CONCLUSION

The FELA does not require a railroad to be an insurer of its employees' emotional health but the foreseeability standard does. Further, the FELA was not enacted to allow an employee to recover for job related stress due to the performance of the duties required to be performed. In contrast, the foreseeability standard adopted in *Gottshall* and *Carlisle* imposes liability for every day working conditions. The foreseeability standard is in actuality a non-standard and will result in the trial of every stress claim. This will increase the workload and costs to an already burdened court system. Moreover, it will increase cost to operators of the rail system, their passengers and, in many instances, to the taxpayers of state-run transit systems. The adoption of standard requiring physical impact or a threat of physical impact is consistent with policies of the FELA and the law of negligence followed in the majority of states. Further, these standards will provide guidance to the courts, their employers and ensure the payment of valid claims.

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